In the
preme Court of the United States

October Term, 1971

No. 71-738

MESCALERO APACHE TRIBE,

Petitioner,

vs.

KLIN JONES, COMMISSIONER OF THE
AU OF REVENUE OF THE STATE
EW MEXICO, ET, AL,

Respondent.

On Writ of Certiorari to the Court of
Appeals of New Mexico

INDEX

Chronological List of Relevant Docket Entries

On or before June 15, 1968 — Petition of Protest

December 31, 1969 — Claim For Refund filed by the Mescalero Apache Tribe with the Bureau of Revenue, State of New Mexico.

January 19, 1970 — Letter Denial of Tribe's Claim for Refund

On or before Dec. 23, 1970 — Stipulation of Facts

December 23, 1970 — Decision and Order of the Commissioner of Revenue, Bureau of Revenue, State of New Mexico.

January 21, 1971 — Complaint on Appeal filed with the Court of Appeals, State of New Mexico

August 6, 1971 — Opinion and Judgment of the Court of Appeals of the State of New Mexico

August 26, 1971 — Motion for Re-Hearing

September 7, 1971 — Motion for Re-Hearing Denied

September 24, 1971 — Application for Writ of Certiorari to the Court of Appeals filed in The New Mexico Supreme Court

October 6, 1971 — Writ of Certiorari Denied by The New Mexico Supreme Court

December 4, 1971 — Petition For Certiorari to the Court of Appeals filed in The United States Supreme Court

April 24, 1972 — Petition For Certiorari Granted

BEFORE THE COMMISSIONER OF REVENUE, STATE OF NEW MEXICO. In the Matter of the Protest of the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises, I. D. No 14-703019-00, Against Bureau of Revenue Assessment No. 66324 for Compensating Tax for the Period 9/1/63 to 4/30/68; and In the Matter of the Claim for Refund of the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises, for Emergency School Tax for the Period 10/1/63 to 11/31/66.

STIPULATION OF FACTS

The Mescalero Apache Tribe, hereinafter called "Tribe" and the Bureau of Revenue, State of New Mexico, hereinafter called "Bureau" hereby stipulate and agree, through their respective attorneys, as follows:

1. That the Tribe is an Indian Tribe which has a Treaty with the United States of America, a copy of which Treaty is marked Exhibit 1, attached hereto and incorporated herein by reference as if set forth in full.

2. That certain lands in Lincoln and Otero Counties of the State of New Mexico have been set aside as a reservation for the Tribe and on which the Mescalero Apache people reside and tribal business is primarily conducted.

3. Pursuant to 25 U.S.C.A., Section 476, the

Tribe, in 1934, adopted a Constitution, a copy of which is marked Exhibit 2, attached hereto and incorporated herein by reference as if set forth in full.

4. Sierra Blanca Ski Enterprises is a ski resort located in Otero and Lincoln Counties, New Mexico, and is exclusively owned and operated by the Tribe. The ski resort is on lands belonging to U. S. Forest Service which have been leased to the Tribe for a period of thirty (30) years. The ski resort area is bordered on the south by the Tribe's reservation and some of the cross-country ski trails are located on the reservation, but no part of the buildings or other equipment used at the ski resort is located within the now existing boundaries of the Tribe's reservation. That a map of said area is marked Exhibit 3, attached hereto and incorporated herein by reference. The Sierra Blanca Ski Enterprises, including the lease with the U. S. Forest Service, was entered into by the Tribe pursuant to Article XI, Section 1 of the Tribe's Constitution which is referred to in paragraph 3, above.

5. The enterprise at Sierra Blanca was entered into by the Tribe after a feasibility study was made by the Bureau of Indian Affairs of the United States of America, which feasibility study was paid for by the federal government.

6. The basic purpose of the ski resort is to provide revenue to the Tribe in lieu of raising revenue through the taxation of Tribal members or in some other manner. The revenue from the ski resort is to be used and is being used for the education, social and economic welfare of the Mescalero Apache people. The

ski resort also provides a job training center for the Mescalero Apache people and approximately 20 to 30 Mescalero Apache people are employed at the ski resort in a job training capacity.

7. The purchase and construction of the ski resort was financed completely by a loan to the Tribe by the federal government under 25 U.S.C.A., Section 470.

8. The approval of the Bureau of Indian Affairs of the Department of the Interior of the United States is required in several areas of the operation at the ski resort. For example, the approval of the Bureau of Indian Affairs must be obtained on:

a. The budget for each fiscal year.

b. The leasing of equipment or other property for use by the Tribe.

c. The leasing of facilities at the ski resort to concessionaires.

d. The plans and designs for the construction of any additional facilities or improvements.

e. The disposal of all property other than expendable items.

f. The form and contents of monthly interim reports and accounting records of the operation.

g. The form and contents of an annual audit which is to be conducted, and the licensed public accountant or firm of public accountants who will conduct the annual audit.

9. The Bureau conducted an audit in May of 1968 which resulted in Assessment No. 96224 being issued

gainst the Tribe for compensating tax in the amount of $5,837.19, plus interest of $893.82 and penalties of $[illegible].73, a copy of which assessment is marked Exhibit [illegible] attached hereto and incorporated herein by reference. The assessment can be broken down for the following periods: For September 1, 1963, to December [illegible], 1965, principal - $4,925.01; penalty - $492.50; interest - $232.89. For January 1, 1966, to April 30, 1968, principal - $962.18; penalty - $96.23; interest - $660.92. The assessment can also be broken down as follows: For September 1, 1963 to August 31, 1965, principal - $[illegible].74; penalty - $77.67; interest - $167.97. For September 1, 1965 to April 30, 1968, principal - $5,110.45; penalty - $511.05; interest - $725.85. The compensating tax assessed was a result of the compensating tax being applied against the purchase price of materials which were used to construct two ski lifts at the ski resort. At the time the audit was conducted and the assessment issued, the ski lifts had been completed and were permanently attached to the realty.

10. All the materials against which the compensating tax was assessed were purchased with money borrowed by the Tribe from the federal government pursuant to 25 U.S.C.A. Section 470, and the purchases of all such materials were subject to and were approved by the Bureau of Indian Affairs of the federal government.

11. The plans and specifications for the construction of the ski lift at the ski resort were approved by the federal government as evidenced by the letter to Wendell Chino, dated October 12, 1965, a copy of

which letter is marked Exhibit 5, attached hereto and incorporated herein as if set forth in full.

12. As a result of such assessment, the Tribe filed a written protest, a copy of which is marked Exhibit 6, attached hereto and incorporated herein by reference as if set forth in full. The written protest was timely filed by the Tribe as required by Section 72-13-38 of the Tax Administration Act. The written protest is hereby amended to include the additional ground on which the Tribe protests the assessment, namely the assessment is barred by the Statute of Limitations and that the Tribe is allowed to raise this defense at the hearing on its Protest of the Assessment.

13. That in December of 1967, the Tribe received the attached letter, marked Exhibit 7, and that such letter was written by the then Chief Counsel of the Bureau and that said letter is incorporated herein as if set forth in full. That in April of 1968, the Tribe received the attached letter marked Exhibit 8, and that such letter was written by the then General Counsel of the Bureau and that said letter is incorporated herein as if set forth in full.

14. That during the period of October 1, 1963, through December 31, 1965, the Tribe paid $15,529.60, and during the period of January 1, 1966, through December 31, 1968, the Tribe paid $10,586.78 in taxes to the Bureau on gross receipts received from its operation at the ski resort. That said sum was paid under the Emergency School Tax Act as amended, being Sections 72-16-1 through 72-16-47, N.M.S.A. 1953 Comp.

15. That a Claim for Refund of the Emergency School Taxes paid was filed by the Tribe on December 31, 1969; a copy of said Claim for Refund is marked Exhibit 9, attached hereto and incorporated herein as if set for (sic) in full. That by letter dated January 19, 1970, the Tribe's Claim for Refund was denied and within thirty (30) days from this denial, the Tribe filed a written request for a hearing on its Claim pursuant to Section 72-13-38, N.M.S.A. 1953 Comp.

16. That the Tribe's Petition of Protest, being Exhibit 6, attached hereto, and the Claim for Refund, being Exhibit 9, attached hereto, be consolidated and heard at the same administrative hearing, and that at such administrative hearing, the facts and statements contained in this Stipulation shall be treated as having been conclusively established by competent evidence and all such facts and statements shall be applicable to both the Petition of Protest and the Claim for Refund.

17. That it is understood the allegations and theories stated in the Petition of Protest and the Claim for Refund, being Exhibits 6 and 9 respectively, are to be considered as being the theories and allegations relied on and asserted by the Tribe at the administrative hearing to be held on this matter, but that the statements and facts contained in the Petition of Protest and the Claim for Refund are not stipulated to by the Bureau except as such statements and facts are established by this Stipulation.

18. That C. L. Sonnichsen is a recognized authority on the Mescalero Apache people and that his book entitled *The Mescalero Apaches*, published in 1958 by

Oklahoma Press at Norman, Oklahoma, is an accurate recording of factual events concerning the Mescalero Apache people and that judicial notice may be taken of the facts stated therein.

[Signatures Omitted in Printing]

EXHIBIT 1

FRANKLIN PIERCE,

PRESIDENT OF THE UNITED STATES OF AMERICA:

July 1, 1852.

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME GREETING:

Preamble.

Whereas a Treaty was made and concluded at Santa Fé, New Mexico, on the first day of July, in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E. V. Sumner, U. S. A., commanding the 9th Department, and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Captain Simon, Captain Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache nation of Indians, situate and living within the limits of the United States, which treaty is in the words following, to wit:

Articles of a Treaty made and entered into at Santa Fé, New Mexico, on the first day of July in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E. V. Sumner, U. S. A., commanding the 9 Department and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache Nation of Indians, situate and living within the limits of the United States.

Authority of United States acknowledged.

Article 1. Said nation or tribe of Indians through their authorised Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit.

Peace to exist.

ARTICLE 2. From and after the signing of this Treaty hostilities between the contracting parties shall forever cease, and perpetual peace and amity shall forever exist between said Indians and the government and people of the United States; the said nation, or tribe of Indians, hereby binding themselves most solemnly never to associate with or give countenance or aid to any tribe or band of Indians, or other persons or powers, who may be at any time at war or enmity with the government or people of said United States.

The Apaches not to assist other tribes in hostilities.

Good treatment of citizens of the United States by nations at peace with them.

ARTICLE 3. Said nation, or tribe of Indians, do hereby bind themselves for all future time to treat honestly and humanely all citizens of the United States, with whom they may have intercourse, as well as all persons and powers, at peace with the said United States, who may be lawfully among them, or with whom they may have any lawful intercourse.

Cases of aggression on them to be referred to government.

Laws to be conformed to.

ARTICLE 4. All said nation, or tribe of Indians, hereby bind themselves to refer all cases of aggression against themselves or their property and territory, to the government of the United States for adjustment, and to conform in all things to the laws, rules, and regulations of said government in regard to the Indian tribes.

Provisions against incursions into Mexico.

ARTICLE 5. Said nation, or tribe of Indians, do hereby bind themselves for all future time to desist and refrain from making any "incursions within the Territory of Mexico" of a hostile or predatory character; and that they will for the future refrain from taking and conveying into captivity any of the people or citizens of Mexico, or the animals or property of the people or government of Mexico; and that they will, as soon as possible after the signing of this treaty, surrender to their agent all captives now in their possession.

Persons injuring the Apaches to be tried and punished.

ARTICLE 6. Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Apache Indian or Indians, he or they shall be arrested and tried, and upon conviction, shall be subject to all the penalties provided by law for the protection of the persons and property of the people of the said States.

ARTICLE 7. The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

Free passage over the Apache territory.

ARTICLE 8. In order to preserve tranquility and to afford protection to all the people and interests of the contracting parties, the government of the United States of America will establish such military posts and agencies, and authorize such trading houses at such times and places as the said government may designate.

Military posts, agencies, and trading house to be established.

ARTICLE 9. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apache's that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

Territorial boundaries to be adjusted.

ARTICLE 10. For and in consideration of the faithful performance of all the stipulations herein contained, by the said Apache's Indians, the government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures as said government may deem meet and proper.

Presents to the Apaches.

ARTICLE 11. This Treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the government of the United States; and, finally, this treaty is to receive a liberal construction at all times and in all places, to the end that the said Apache Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.

When treaty to be binding.

How construed.

In faith whereof we the undersigned have signed this Treaty, and affixed thereunto our seals, at the City of Santa Fé, this the first day of July in the year of our Lord one thousand eight hundred and fifty-two.

[Signatures omitted in Printing]

[Ratification by Senate omitted in Printing]

[Execution by President omitted in Printing]

[Map - U. S. Forest Lands (Exhibit 3) Omitted in Printing]

REVISED CONSTITUTION
MESCALERO APACHE TRIBE
MESCALERO RESERVATION
NEW MEXICO

APPROVED MARCH 25, 1936
REVISED JANUARY 12, 1965

EXHIBIT "2"

REVISED
CONSTITUTION OF THE APACHE TRIBE
of the
MESCALERO RESERVATION

PREAMBLE

We, the members of the Apache Tribe of the Mescalero Reservation, in order to promote justice, insure tranquility, encourage the general welfare, foster the social and economic advancement of our people, safeguard our interests, bring our representative tribal government into closer alignment with State and National governments, and secure for ourselves and for our posterity the blessing of freedom and liberty, do hereby establish this revised constitution as the foundation upon which our tribal government shall rest.

ARTICLE I — THE MESCALERO APACHE TRIBE

Section 1. The Apache Tribe of the Mescalero Reservation, hereinafter referred to as the Mescalero Apache Tribe, shall include all persons recognized as members thereof, or upon whom membership may be conferred, pursuant to the provisions and restrictions imposed by Article IV of this constitution, irrespective of the Apache Band with which they may be identified.

ARTICLE II — TERRITORY

Section 1. The jurisdiction of the Mescalero Apache Tribe, its tribal council and courts shall ex-

tend to all the territory within the exterior boundaries of the reservation, and to such other lands as may be added thereto by purchase, gift, Act of Congress, or otherwise.

ARTICLE III — RESERVATION LANDS

Section 1. Title to reservation lands shall remain tribal property and shall not, in whole or in part, be granted by allotment or otherwise to tribal members or groups of members as private property. The control of reservation lands, and of assignments or leases thereof, and of other tribal property, shall be in the tribal council, subject to applicable Federal authority, and regulated by ordinances not inconsistent with or contrary to this constitution.

Sec. 2. The tribal council shall have power to assign unused tribal lands, or to reassign any unused assignments, or portions thereof, which have been idle for two (2) or more years. No reassignment of a homestead may be made so long as the original assignee shall reside on the homesite, unless he shall voluntarily release the homesite to the tribe. A member may transfer his homesite to one of his children. The tribal council shall decide by ordinance what shall constitute a unit for purposes of assignment of land for private use, and shall determine the rules governing the use and transfer of such assignments.

Sec. 3. A non-member who is the surviving spouse of a member of the tribe shall have the privilege to use an assignment for the benefit of enrolled minor children, but a non-member shall not acquire any vested interest or rights in any tribal property,

except as otherwise provided by ordinance of the tribal council, or by applicable Federal law.

ARTICLE IV — MEMBERSHIP

Section 1. The membership of the Mescalero Apache Tribe shall consist of the following persons:

(a) Any person whose name appeared on the Census Roll of the Mescalero Apache Agency of January 1, 1936.

(b) All persons born to resident members after the census of January 1, 1936, and prior to the effective date of this constitution.

(c) Any child born to a non-resident member, prior to the effective date of this constitution, provided that such child shall have resided on the Mescalero Reservation for not less than one (1) year immediately preceding the date of enrollment.

(d) Any person of one-fourth degree or more Mescalero Apache blood, born after the effective date of this constitution, either one or both of whose parents is (are) enrolled in the membership of the Mescalero Apache Tribe.

Sec. 2. No persons, being enrolled or recognized as a member of another tribe, shall be eligible for enrollment in the Mescalero Apache Tribe.

Sec. 3. The tribal council shall have the power to adopt ordinances, consistent with this constitution, governing future membership, loss of membership,

and the adoption of members into the Mescalero Apache Tribe, which ordinances shall be subject to review by the Secretary of the Interior.

Sec. 4. The tribal council shall have the power to prescribe rules to govern the compilation and maintenance of a membership roll, and to make corrections in the basic roll, subject to the approval of the Secretary of the Interior.

Sec. 5. The constitution of the Mescalero Apache Tribe, and ordinances enacted pursuant thereto, shall govern tribal membership and enrollment. No decree of any non-tribal court purporting to determine membership in the tribe, determine paternity, or determine the degree of Indian blood, shall be recognized for membership purposes. The tribal council shall have sole authority and original jurisdiction to determine eligibility for enrollment, except where the membership of an individual is dependent upon an issue of paternity, in which case the trial court, or the tribal council sitting as an appellate court, shall have authority and exclusive jurisdiction.

ARTICLE V — BILL OF RIGHTS

Section 1. Subject to the limitations prescribed by this constitution, all members of the Mescalero Apache Tribe shall have equal political rights and equal opportunities to participate in the economic resources and tribal assets, and no member shall be denied freedom of conscience, speech, religion, association or assembly, nor shall he be denied the right to petition the tribal council for the redress of grievances against the tribe.

ARTICLE VI — DISQUALIFICATION OF TRIBAL MEMBERS FOR ELECTIVE OFFICE

Section 1. No person who has been convicted of any felony or other serious offense, including adultery, bribery, embezzlement, extortion, fraud, forgery, misbranding, perjury, theft, habitual drunkenness, or felonious assault or felonious battery, shall be eligible for candidacy to any elective office of the Mescalero Apache Tribe unless he shall have been pardoned by the President of the Mescalero Apache Tribe in conformity with applicable ordinances and procedures prescribed by the tribal council.

ARTICLE VII — ORGANIZATION OF THE GOVERNMENT OF THE MESCALERO APACHE TRIBE

Section 1. The powers of the government of the Mescalero Apache Tribe are divided into three distinct departments, the Legislative, the Executive and the Judicial, and no person or group of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as this constitution may otherwise expressly direct or permit.

ARTICLE VIII — PART I — THE LEGISLATIVE DEPARTMENT: COMPOSITION AND QUALIFICATIONS

Section 1. The legislative powers of the Mescalero Apache Tribe shall rest in the Mescalero Apache Tribal Council, hereinafter referred to as the tribal

council, which shall hold its sessions at the seat of the tribal government.

Sec. 2. The tribal council shall consist of eight (8) members, elected at large from the membership of the Mescalero Apache Tribe.

Sec. 3. The members of the tribal council shall be at least twenty-five (25) years of age at the time of election or appointment (Article X, Section 4); shall have one-quarter or more Mescalero Apache Indian blood; shall have resided on the Mescalero Apache Reservation for a period of at least six (6) months immediately prior to the election, and shall be subject to the restrictions set out in Article VI.

Sec. 4. No person shall serve as a member of the Mescalero Apache Tribal Council while holding any other elective office, or policy making position with the tribe or with any organization doing business on the Mescalero Reservation.

ARTICLE IX — NOMINATIONS AND ELECTIONS

[Omitted in Printing]

ARTICLE X — VACANCIES AND REMOVAL FROM OFFICE

[Omitted in Printing]

ARTICLE XI — POWERS OF THE TRIBAL COUNCIL

Section 1. The Mescalero Apache Tribal Council shall have the following duties and powers subject to all applicable laws of the United States, this consti-

tution, and the regulations of the Secretary of the Interior.

(a) To veto the sale, disposition, lease, or encumbrance of tribal lands, interest in lands, or other tribal assets, that may be authorized by any agency of government without the consent of the tribe; and any encumbrance, sale, grant, or lease of any portion of the reservation, or the grant of any rights to the use of lands or other assets, or the grant of relinquishment of any water or mineral rights or other natural or fiscal assets of the Mescalero Reservation, are hereby reserved to the sanction of the tribal council.

(b) To encumber, lease, permit, sell, assign, manage or provide for the management of tribal lands, interests in such lands or other tribal assets; to purchase or otherwise acquire lands or interests in lands within or without the reservation; and to regulate the use and disposition of tribal property of all kinds.

(c) To protect and preserve the property, wildlife and natural resources of the tribe, and to regulate the conduct of trade and the use and disposition of tribal property upon the reservation, provided that any ordinance directly affecting non-members of the tribe shall be subject to review by the Secretary of Interior.

(d) To adopt and approve plans of operation to govern the conduct of any business or industry that will further the economic well-being of the members of the tribe, and to undertake any activity of any nature whatsoever, not inconsistent with Federal law or with this constitution, designed for the social or economic improvement of the Mescalero Apache people, such plans of operation and activities to be subject to review by the Secretary of the Interior.

(e) To use tribal funds as loans or grants, and to transfer tribal property and other assets, to tribal corporations, associations, commissions or boards for such use as the tribal council may determine in conformity with this constitution and consistent with applicable Federal laws and regulations.

(f) To authorize the president to negotiate contracts, leases and agreements of every description not inconsistent with Federal law or with this constitution, subject to review or approval by the Secretary of the Interior which such review or approval is required by statute or regulations; Provided, that all contracts, leases and agreements so negotiated shall be subject to approval by the tribal council.

(g) To acquire, by condemnation, lands of tribal members on the reservation, for public purposes, provided that such mem-

bers shall be reimbursed the full value of improvements they have placed on such lands as determined by appraisal. The manner of appraisal and the procedures governing condemnation shall be established by ordinance of the tribal council, subject to review by the Secretary of the Interior.

(h) To regulate its own procedures, including the adoption and amendment of bylaws; to appoint subordinate boards, commissions, committees, tribal officials and employees not otherwise provided for in this constitution and to prescribe their salaries, tenure and duties; to charter tribal corporations, and to charter and regulate other subordinate organizations for economic and other purposes, subject to review by the Secretary of the Interior when required by Federal law or regulation.

(i) To represent the tribe and act in all matters that concern the welfare of the tribe and to make decisions not inconsistent with, or contrary to, this constitution.

(j) To negotiate with the Federal, State, or local Governments, and to advise and consult with representatives of the Interior Department on all activities that may affect the reservation, and in regard to all appropriation estimates and Federal projects for the benefit of the tribe before such

estimates or projects are submitted to the Bureau of the Budget and to Congress.

(k) To borrow money from the Federal Government or other lenders for tribal use.

(l) To administer any funds or property within the exclusive control of the tribe, and to make expenditures from available funds for public purposes of the tribe, including salaries and remuneration of elective officials, officers and tribal employees. With the approval of the Secretary of the Interior, tribal funds from any source may be authorized for dividend or per capita payments to the members of the tribe.

(m) To administer charity.

(n) To make loans to tribal members in accordance with regulations of the Secretary of the Interior, this constitution and other applicable laws.

(o) To employ legal counsel for the protection and advancement of the rights of the tribe and its members, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior, so long as such approval is required by Federal law.

(p) To enact ordinances, subject to review by the Secretary of the Interior, establishing and governing tribal courts and tribal law enforcement agencies on the reser-

vation; regulating social and domestic relations of members of the tribe; including provision for the issuance of decrees of divorce, provided that all marriages between tribal members shall be in conformity with applicable laws of the State; providing for the appointment of guardians for minors and mental incompetents; regulating the inheritance of personal property of tribal members; and providing for the removal or exclusion from the reservation of any nonmembers of the Mescalero Apache Tribe whose presence may be injurious to tribal members or to the interests of the tribe, as determined by the tribal council.

(q) To issue to each of its members a non-transferable certificate of membership, evidencing the equal share of each member in the assets of the tribe, said tribe poration, and to use any net income return to the tribe from corporate enterprises for public and social purposes of the tribe.

(r) To administer oaths; to require, upon proper notice being given stating time and place of hearing and the general nature of the subject to be discussed, any member of the tribe to appear and give testimony before the tribal council; and to provide by ordinance, subject to review by the Secretary of the Interior, for punishment of such members upon failure to comply with

such requirements, or for giving false testimony.

(s) To enact and provide for the enforcement of ordinances, subject to review by the Secretary of the Interior, for the assessment of taxes, licensing and other fees on persons or organizations doing business on the reservation.

(t) No authority or power contained in this constitution may de delegated by the Mescalero Apache Tribal Council, to tribal officials, committees, or associations to carry out any functions, or do any thing for which primary responsibility is vested in the tribal council, except by ordinance or resolution duly enacted by the tribal council.

(u) To deposit, to the credit of the Mescalero Apache Tribe, tribal funds, without limitation on the amount in any account, in any National or State bank whose deposits are insured by any agency of the Federal Government; Provided, that advances to the tribe from funds held in trust in the United States Treasury shall be deposited with a bonded disbursing officer of the United States whenever the conditions prescribed by the Secretary of the Interior in connection with such advance, require that the advance be so deposited.

(v) To exercise tribal powers indepen-

dently, under this constitution, whenever limitations on such free exercise of tribal powers, imposed by regulations of the Secretary of the Interior, are removed; to exercise other inherent powers not heretofore exercised or included in this constitution; and to exercise powers which have been excluded from tribal authority by applicable statutes of Congress, in the event such statutes are amended or rescinded; provided, that except for waiver of Secretarial review or approval authority, the exercise of additional tribal powers, by the tribal council, shall be in conformity with appropriate amendments to this constitution, pursuant to the provisions of Article XV and Article XXVII hereof.

ARTICLE XII — REVIEW AND APPROVAL OF ENACTMENTS

Section 1. Every resolution or ordinance passed by the tribal council shall, before it becomes effective, be presented to the president for approval within five (5) days following the date of its passage. If he approves he shall sign it within ten (10) days following its receipt and deposit it with the Secretary of the Mescalero Apache Tribe for such further action as may be necessary. If he does not sign an enactment of the tribal council, he shall, at the next meeting of the tribal council following its submittal to him for signature, return it to the tribal council with a statement of his objections. It shall thereafter not become effective unless it is again approved by two-thirds of

the members present, providing that those present constitute a quorum of the tribal council.

Sec. 2. Every resolution or ordinance which, under this constitution is subject to review by the Secretary of the Interior, shall be, within ten (10) days following its approval by the president or, in the event of presidential veto, by a two-thirds majority of the tribal council as provided in Section 1 of Article XII above, presented to the Superintendent of the Mescalero Reservation. Within ten (10) days after receipt thereof, the Superintendent shall approve or disapprove the same.

Sec. 3. If the Superintendent shall approve any resolution or ordinance subject to review by the Secretary of the Interior, it shall thereupon become effective, but the Superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may within ninety (90) days from the date of such approval by the Superintendent rescind the said resolution or ordinance for any cause, by transmitting notification to the President of the Mescalero Apache Tribe of such rescission.

Sec. 4. If the Superintendent shall refuse or fail to approve any resolution or ordinance submitted to him within ten (10) days after its receipt, he shall advise the tribal council of his reasons therefor, and if the reasons appear to the tribal council to be insufficient it may, by majority vote, refer the resolution or ordinance to the Secretary of the Interior who shall, within ninety (90) days from the date of receipt, approve or disapprove same in writing; Providing, how-

ever, that such resolution or ordinance shall become effective (90) days after the date of receipt unless the Secretary of the Interior shall disapprove in writing such resolution or ordinance.

Sec. 5. Any resolution or ordinance that is, by the terms of this constitution, subject to the approval of the Secretary of the Interior, shall be presented to the Superintendent who shall, within 10 days after receipt thereof, transmit the same to the Secretary of the Interior with his recommendation for or against approval.

Sec. 6. The said resolution or ordinance shall become effective when approved by the Secretary of Interior.

Sec. 7. Upon request by the tribal council, the Secretary of the Interior may waive any requirement contained in this constitution relating to review or approval of resolutions and ordinances, or to the exercise of other powers of the tribal council. Such waiver shall be for such period of time and under such conditions as the Secretary of the Interior may prescribe.

ARTICLE XIII — TRIBAL BUDGET AND BUSINESS ENTERPRISES

Section 1. Before the beginning of each fiscal year, the tribal council shall adopt and approve an annual tribal budget providing funds for the support of all approved tribal programs. No expenditures of tribal funds may be made except in conformity with the approved budget. The annual tribal budget shall

be subject to such review and approval as may be required by the Secretary of the Interior.

Sec. 2. The Mescalero Apache Tribal Council shall, by ordinance, establish the principles and policies governing the operation and control of all enterprises of the tribe.

ARTICLE XIV — REFERENDUM

Section 1. Upon receipt of a petition signed by at least thirty percent (30%) of the qualified voters of the tribe and filed with the secretary of the tribal council demanding a referendum thereon, any proposed or enacted resolution, ordinance or other action of the tribal council shall either be repealed by the tribal council or be submitted by it to the electorate for decision by the tribe in a general election to be held within thirty (30) days after receipt of the petition. The referendum shall be conclusive only if at least thirty percent (30%) of the qualified voters cast their ballots therein.

Sec. 2. When a majority of the members of the tribal council shall request a referendum on any proposed or enacted resolution, ordinance, or other action of the tribal council, the tribal council shall call an election within thirty (30) days thereafter at which the members of the tribe shall approve or disapprove, by majority vote, the ordinance or action in question; provided, however, that such approval or disapproval shall be effective only in the event thirty percent (30%) or more of the qualified voters cast their ballots in such election.

Sec. 3. No referendum conducted pursuant to the provisions of Section 1 above shall serve to abrogate, modify, or amend any properly approved contract or agreement with third parties who are not members of the Mescalero Apache Tribe.

ARTICLE XV — CONSTITUTIONAL AMENDMENT

Section 1. This constitution may be amended at an election called by the Secretary of the Interior upon request by the tribal council:

(a) Whenever, by majority vote of all members of the tribal council, the governing body of the tribe shall authorize the submission of a proposed amendment to the electorate of the tribe, or,

(b) When a minimum of thirty percent (30%) of the qualified voters of the tribe, by signed petition, shall request such amendment.

Sec. 2. If, at such election, the amendment is adopted by majority vote of the qualified voters of the tribe voting therein, and if the number of ballots cast represents not less than thirty percent (30%) of the qualified voters, such amendments shall be submitted to the Secretary of the Interior and, if approved by him, it shall thereupon take effect.

ARTICLE XVI — SESSIONS OF THE TRIBAL COUNCIL

[Omitted in Printing]

ARTICLE XVII — QUORUM; VOTE

[Omitted in Printing]

ARTICLE XVIII — ORDINANCES AND RESOLUTIONS

Section 1. All final decisions of the tribal council, on matters of permanent interest to members of the tribe and necessary to the orderly administration of tribal affairs, shall be embodied in ordinances, the format of which shall be established in the bylaws of the tribal council. Such enactments shall be available for public inspection at any reasonable times by members of the tribe.

Sec. 2. All final decisions of the tribal council on matters of temporary interest, or matters relating to particular individuals, officials or circumstances shall be embodied in resolutions. Such actions of the tribal council shall also be subject to public inspection by members of the tribe.

ARTICLE XIX — PART 2 — THE EXECUTIVE DEPARTMENT: COMPOSITION AND MANNER OF SELECTION

Section 1. The Executive Department of the Mescalero Apache Tribal Government shall consist of a president, a vice-president, a secretary and a treasurer.

Sec. 2. The President and Vice-President of the Mescalero Apache Tribe shall be elected. The remain-

ing officers shall be appointed by the president with the concurrence of the tribal council, and persons appointed to fill such offices shall serve during the pleasure of the president, provided that the tribal council must concur in the removal from office of any such appointive officer of the tribe.

ARTICLE XX —
PRESIDENT AND VICE PRESIDENT: TERM OF OFFICE AND QUALIFICATIONS

[Omitted in Printing]

ARTICLE XXI —
PRESIDENT AND VICE PRESIDENT: VACANCIES AND REMOVAL FROM OFFICE

[Omitted in Printing]

ARTICLE XXII — DUTIES OF OFFICERS

Section 1. The President of the Mescalero Apache Tribe shall exercise the following powers as the chief executive officer of the tribe:

(a) The president shall serve as the Chairman of the Mescalero Apache Tribal Council, but he shall not have the right to vote on any issue except to break a tie vote of the council in the absence of the vice-president.

(b) The president shall appoint all non-elected officials and employees of the exe-

cutive department of the tribal government and shall direct them in their work, subject only to applicable restrictions embodied in this constitution or in enactments of the tribal council establishing personnel policies or governing personnel management.

(c) The president, subject to the approval of the tribal council, may establish such boards, committees or subcommittees as the business of the council may require, and shall serve as an ex-officio member of all such committees and boards.

(d) The president shall serve as contracting officer for the Mescalero Apache Tribe, following approval of all contracts by the tribal council.

(e) The president shall have veto power over enactments of the tribal council, as provided in Article XII, Section 1.

(f) Subject to such regulations and procedures as may be prescribed by ordinance of the tribal council, the president shall have power to grant pardons, after conviction for all offenses, to restore tribal members to eligibility for elective office in the tribal government, subject to the restrictions contained in Article X, Section 1.

(g) The president shall direct the tribal police, to assure the enforcement of ordinances of the tribal council.

(h) The president shall hold no other tribal office or engage in private remunerative employment without the consent of the tribal council, during his term as president.

Sec. 2. In the absence of the president, the vice-president shall preside and shall have all powers, privileges and duties of the president.

Sec. 3. The vice-president may function as chairman of the tribal council or of any committee thereof in the absence of, or at the direction of, the president. When presiding as chairman of the tribal council he shall have the right to vote only in the event the council or any committee thereof is equally divided on an issue. In his capacity as vice-president, he may be counted for purposes of constituting a quorum at any such meeting and when so counted may vote on any business then before the council.

Sec. 4. The vice-president may attend any session of the tribal council or of any council committee and he may participate therein, but he shall not have the right to vote unless required to make a quorum or to break a tie.

Sec. 5. The vice-president shall perform such other duties as the president, with the consent of the tribal council, may direct.

ARTICLE XXIII — THE SECRETARY OF THE MESCALERO APACHE TRIBE

[Omitted in Printing]

ARTICLE XXIV — TREASURER OF THE MESCALERO APACHE TRIBE

Section 1. The treasurer shall be appointed from within the membership of the tribal council.

Sec. 2. (a) The treasurer shall accept, receipt for, keep and safeguard all funds under the exclusive control of the tribe by depositing them in a bank insured by an agency of the Federal Government, or in an Individual Indian Money Account as directed by the Mescalero Apache Tribal Council, and shall keep an accurate record of such funds and shall report on all receipts and expenditures and the amount and nature of all funds in his custody to the council at regular meetings and at such other times as requested by the council. He shall not pay or otherwise disburse any funds in custody of the council except when properly authorized to do so by the council.

(b) The books and records of the treasurer shall be audited at least once a year by a competent auditor employed by the council, and at such other times as the council may direct.

(c) The treasurer shall be required to give a surety bond satisfactory to the council and the Commissioner of Indian Affairs.

(d) The treasurer shall be present at all meetings of the council unless prevented by circumstances beyond his control.

(e) All checks shall be signed and all vouchers shall be approved for payment by two

officers of the tribe as follows: the president or the vice-president, together with the treasurer or, in his absence, the secretary.

(f) In the absence of the president, vice-president and secretary, the treasurer shall carry on the duties of the president.

Sec. 3. The tribal council may require all responsible tribal officials and employees to be bonded. The premium for the bond shall be paid by the tribe.

ARTICLE XXV — PART III — THE JUDICIARY
JUDICIAL POWERS

Section 1. The judicial powers of the Mescalero Apache Tribe shall be vested in the tribal court, including a trial and appellate court, which courts shall exercise jurisdiction in all criminal matters, except those matters within the exclusive jurisdiction of the Federal and State Courts, wherein the defendants are members of the Mescalero Apache Tribe or members of other Indian tribes residing within the Mescalero Reservation; and may exercise jurisdiction in all civil matters wherein only members of the Mescalero Apache Tribe are involved.

Sec. 2. The criminal offenses over which the Courts of the Mescalero Apache Tribe have jurisdiction may be embodied in a Code of Laws, adopted by ordinances of the tribal council, and subject to review by the Secretary of the Interior.

Sec. 3. The duties and procedures of the courts shall be determined by ordinance of the tribal council.

ARTICLE XXVI — COMPOSITION OF THE TRIBAL COURTS

Section 1. The trial court shall consist of a chief judge and two associate judges, appointed by the President of the Mescalero Apache Tribe, with the concurrence of not less than a three-fourths majority vote of the whole membership of the tribal council.

Sec. 2. The tribal council shall sit as a court of appeals whenever necessary and may hear appeals at any regular or special meeting.

Sec. 3. The tenure and salary of tribal judges shall be established by ordinance of the tribal council.

Sec. 4. No person shall be appointed to the office of tribal judge unless he is an enrolled member of the Mescalero Apache Tribe, not less than 35 years nor more than 70 years of age; nor shall any person be appointed as a tribal judge who has ever been convicted of a felony or, within one year, the last past, of a misdemeanor.

ARTICLE XXVII — INHERENT POWERS OF THE MESCALERO APACHE TRIBE

Section 1. No provision of this constitution shall be construed as a limitation on the inherent residual sovereign powers of the Mescalero Apache Tribe. Any such powers, not delegated to the representative tribal government by this constitution, are retained for direct exercise by the people through referendum, as provided for herein, or for exercise by the tribal government following amendment of the constitution.

ARTICLE XXVIII — SAVING CLAUSE AND REPEAL OF PREVIOUS CONSTITUTION

Section 1. The Constitution and Bylaws of the Apache Tribe of the Mescalero Reservation, approved on March 25, 1936, under the provisions of Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378), is hereby repealed and superseded by this constitution.

Sec. 2. All ordinances and resolutions heretofore enacted by the Mescalero Tribal Business Committee shall remain in full force and effect to the extent that they are not inconsistent with this constitution.

Sec. 3. The incumbent tribal business committee and incumbent tribal officers shall remain in office and shall be entitled to exercise all powers granted by this constitution to the tribal council and tribal officers until such time as the first election of the tribal council and tribal officers is held under this constitution.

ARTICLE XXIX — OATH OF OFFICE

[Omitted in Printing]

ARTICLE XXX — RATIFICATION OF REVISED CONSTITUTION

Section 1. This constitution, when adopted by a majority vote of the qualified voters of the Mescalero Apache Tribe, voting at an election called for that purpose by the Secretary of the Interior, in which at least thirty percent (30%) of those entitled to vote

shall cast their ballots, shall be submited to the Secretary of the Interior for his approval, and shall be effective from the date of approval.

CERTIFICATION OF ADOPTION

Pursuant to an election authorized by the Secretary of the Interior on December 11, 1964, the attached Revised Constitution of the Apache Tribe of the Mescalero Reservation was submitted to the qualified voters of the tribe and was on December 18, 1964, duly adopted by a vote of 190 for and 103 against, in an election in which at least 30 percent of the 635 members entitled to vote cast their ballot in accordance with Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).

KENNETH L. PAYTON
Chairman, Election Board

CHRISTIE LA PAZ
Election Board Member

ALTON PESO
Election Board Member

APPROVAL

I, John A. Carver, Jr., Under Secretary of the Interior of the United States of America, by virtue of the authority granted me by the Act of June 18, 1934 (48 Stat. 984), as amended, do hereby approve the attach-

Revised Constitution of the Apache Tribe of the Mescalero Reservation.

Approval recommended:
JAMES E. OFFICER
Associate Commissioner
Bureau of Indian Affairs

JOHN A. CARVER, JR.
Under Secretary of the Interior
[SEAL]

WASHINGTON, D. C., *January* 12, 1965

COMMISSIONER, BUREAU OF REVENUE—STATE OF NEW MEXICO—SANTA FE, NEW MEXICO

NOTICE OF ASSESSMENTS OF TAXES

ASSESSMENT 96224
(Invalid If Assessment No. Is Not Shown)
DATE ISSUED May 16, 1968
(Date of Mailing or of Delivery in person)
REPORTING PERIOD 9/1/63 to 4/30/66
NEW MEXICO
IDENTIFICATION NO. 18-703019-00
PERMIT NO. 6

Sierra Blanca Ski Enterprises
Box 176
Mescalero, N. Mex.

Type of Tax	Tax Due	Penalties & Interest Due	Total Amount Due
1. Gross Receipts Tax			
2. Municipal Tax-Municipality			
3. Compensating Tax	5,887.19	1,482.55	7,369.74
4. Income Tax Withheld			
5. Gasoline or Motor Fuel Tax-Class No.			
6. Liquor Tax			
7. Cigarette Tax			
8. Severance Tax			
9. Succession Tax			
TOTAL	5,887.19	1,482.55	
	(4)	(6)	

Please Remit This Amount Within 30 Days After The Date Of Issuance. Failure To Pay May Render The Taxpayer Subject To The Assessment Of Additional Interest And Levy. For Alternative Remedies, See Reverse Side. $7,369.74

Explanation of Liability:

Per Audit by Romero & Maestas
Dated 5/10/68
Compensating Tax:
Balance due $5,887.19
Interest 973.82
Penalty 508.73
Total due $7,369.74

REQUESTING DIVISION Audit

BY Approved Billing Section
(Stamped)

Misc

Signature Date

For The Commissioner

[Instructions omitted in Printing]

EXHIBIT "4"

Credit
Ski Enterprises
Improvements

Mescalero Indian Agency
Mescalero, New Mexico
Oct. 12, 1965

Mr. Wendell Chino, President
Mescalero Apache Tribal Council
Mescalero, New Mexico

Dear Mr. Chino:

This is to advise that the lift plans and specifications for the new double chairlift of the Tribal Ski Enterprise are formally approved by delegated authority to this office September 29, 1965 in accordance with the temporary plan of operation still in effect at this time. In like manner, your official approval of the plans and specifications is requested for the record by your signature below.

Please sign the original and three (3) copies. Retaining one copy for your record and return the original and two (2) copies for our distribution.

s/Kenneth L. Payton
Superintendent

The plans and specifications for one (1) double chairlift to be installed at the Sierra Blanca Ski Resort, a Tribal Enterprise, are hereby approved.

[Signatures omitted in printing]

EXHIBIT "5"

COMMISSIONER
BUREAU OF REVENUE
STATE OF NEW MEXICO

PROTEST OF ASSESSMENT NO. 96224 ISSUED 5/16/68, FOR COMPENSATING TAX FOR THE PERIOD OF 9/1/63 to 4/30/68 OF $7,369.74 to SIERRA BLANCA SKI ENTERPRISES, BOX 176, MESCALERO, NEW MEXICO

COMES NOW the Mescalero Apache Tribe by and through its attorneys, Fettinger, Bloom & Overstreet of Alamogordo, New Mexico, and protests the above assessment made by the Bureau of Revenue of the State of New Mexico upon the following grounds and theories and upon the following authorities and the grounds and theories set forth in those authorities:

1. That the Mescalero Apache Tribe is an Indian Tribe recognized by the United States as evidenced by the Treaty of July 1, 1852, 10 Stat. 979. See also 15 Indian Claims Commission 532,decided 6/9/67.

2. That the Mescalero Apache Tribe is the owner and operator of Sierra Blanca Ski Enterprises subject to the supervision and control of the United States.

3. That the financing of the operation at Sierra Blanca, including the purchase of the property assessed was obtained by funds from the United States under 25 U.S.C.A. Section 470.

4. That the purchase of the property against

which this Assessment was made was approved by the United States.

5. That the net proceeds received from the operation at Sierra Blanca is used for the educational, social and economic benefit of the Mescalero Apache people.

6. That the Mescalero Apache Tribe is not a "person" as defined in N.M. Session Laws, 1939, Ch. 95, Section 2, as amended, of the Compensating Tax Act of 1939, and therefore the assessment is invalid and improper based on:

A. *Choteau v. Commissioner of Internal Revenue*, 38 F.2d 976 (1930).

B. Internal Revenue Ruling No. 67-284.

7. That the Mescalero Apache Tribe is an agency, instrumentality, department, institution or political subdivision of the United States and therefore exempt from the assessment under New Mexico Session Laws, 1939, Ch. 95, Section 4, as amended, of the Compensating Tax Act of 1939, and also under the following authorities:

A. *United States v. Thurston County*, 143 Fed. 287 (1906).

B. *Choteau v. Burnet*, 283 U.S. 691 (1931).

C. *Clallum County v. United States*, 263 U. S. 341 (1923).

D. *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

8. That the application of the New Mexico Compensating Tax on property belonging to the Mescalero

Apache Tribe at Sierra Blanca is inconsistent with the Treaty of July 1, 1852, 10 Stat. 979, 25 U.S.C.A. Section 465 and 25 U.S.C.A. Section 476; U.S. CONST. art. I, Section 8; U.S. CONST. amend. V; U.S. CONST. amend. XIV, Section 1; N.M. CONST. art. XXI, Section 2; and N.M. CONST. art. II, Section 18.

9. That the assessment is invalid and improper because such assessment interferes with an Indian tribe's right to self government based on:

A. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

B. *Williams v. Lee*, 358 U.S. 217 (1959).

C. *Warren Trading Post v. Tax Comm'n.*, 380 U.S. 685 (1965).

D. *Ghahate v. Bureau of Revenue*, 80 N.M. 98 (Ct. App.), 451 P.2d 1002 (1969).

E. 25 U.S.C.A. Section 476.

F. *Morgan v. Colorado River Indian Tribe*. 103 Ariz. 425, 443 P.2d 421 (1968).

G. *McCulloch v. Maryland*, supra.

H. *Clallum County v. United States*, supra.

10. That the State of New Mexico has no jurisdiction to tax the Mescalero Apache Tribe because exclusive jurisdiction over such tribe is vested in United States government, based on:

A. Treaty of July 1, 1852, 10 Stat. 979.

B. N.M. CONST. art. XXI, Section 2.

C. U.S. CONST. art. 1, Section 8.

D. *Your Food Stores, Inc. (NSL) v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950 (1961).

E. *Worcester v. Georgia*, supra.
F. *Williams v. Lee*, supra.
G. *Warren Trading Post v. Tax Comm'n.*, supra.

11. That the operation of Sierra Blanca Ski Enterprises is for charitable and educational purposes and that the property against which this assessment was made was used for charitable and educational purposes and therefore such use is exempt under N.M. Session Laws, 1939, Ch. 95, Section 4, as amended, of the Compensating Tax Act of 1939.

12. That the imposition or collection of this tax on the Mescalero Apache Tribe is a denial of the equal protection of the laws and a taking of property without due process of law all in violation and prohibited by the U.S. CONST. amend. V and U.S. CONST. amend. XIV, Section 1 and N.M. CONST. art. II, Section 18.

13. That the Bureau of Revenue is estopped from assessing the Compensating Tax during this period because the Mescalero Apache Tribe's failure to pay the Compensating Tax on the property assessed was in reliance upon rulings and regulations of the Bureau of Revenue.

Based on the above grounds and authorities, the Mescalero Apache Tribe respectfully requests that the above assessment be cancelled.

[Signatures omitted in printing]

STATE OF NEW MEXICO
BUREAU OF REVENUE
SANTA FE
87501

L. A. McCULLOCH, JR.
Chief Counsel

December 13, 1967

Mescalero Apache Tribe
Box 176
Mescalero, New Mexico

Re: Mescalero Apache Tribe, d/b/a
Sierra Blanca Ski Entr
Identification No. 18-703019-00
Exemption Request and Nontaxable Transaction Certificate

Gentlemen:

The application for a Nontaxable Transaction Certificate that you returned to the Records Division has been forwarded to my office for analysis to determine if the above referenced organization qualifies.

Under N.M.S.A. Sec 72-16A-12 (A) 53 Comp. (67 P.S.) gross receipts of political subdivisions of the United States and the State of New Mexico are exempt from taxation.

Also, use of property by political subdivisions of the United States and the State of New Mexico is exempted from the compensating tax by N.M.S.A. Sec 72-16A-12 (B) 53 Comp. (67 P.S.).

EXHIBIT "7"

In addition, by the provisions of N.M.S.A. Sec 72-16A-14 (G) 53 Comp. (67 P.S.) the governing body of any Indian Tribe or Indian Pueblo are permitted to make tax deductible purchases of tangible personal property without furnishing the seller with any form of documentation, such as the Nontaxable Transaction Certificate. Even without this documentation, the seller may deduct these receipts from his gross receipts when reporting.

You are reminded that the Gross Receipts and Compensating Tax Act makes no provisions for a tax deduction by the seller when the purchaser is leasing or accepting a service rather than the purchase of tangible personal property.

Please advise if I may be of further service.

[Signatures omitted in printing]

April 16, 1968

Mescalero Apache Tribe
P. O. Box 176
Mescalero, New Mexico

RE: Sierra Blanca Ski Enterprise
Id. #18-703019-00

Gentlemen:

We find it necessary to call attention to an incomplete statement of the law made in a letter to you from the Legal Division of the Bureau of Revenue. The letter (dated December 13, 1967) concerned an application which you filed with the Bureau of Revenue asking for a nontaxable transaction certificate.

Because of certain matters omitted from that letter, it probably left the erroneous impression that none of the business transactions, purchases, or income of Indian tribes are taxable by the State of New Mexico. As a matter of fact, many such activities are taxable.

We first call your attention to the fact that there is no exemption whatever to Indian tribes, insofar as our sales or gross receipts tax is concerned. In other words, any money received by an Indian tribe from business operations, including leasing, is taxable by the Bureau of Revenue of the State of New Mexico. The tax rate upon the gross receipts from any such business is 3%.

Likewise, any equipment or other tangible personal property purchased outside the State of New Mexico and imported into the State of New Mexico for use within the State, and upon which the sales or gross

EXHIBIT "8"

receipts tax has not been paid, is taxable under the New Mexico Compensating Tax Act.

Prior to July 1, 1967, the material portion of our compensating or use tax act (Section 72-17-3, N.M.S.A., 1953 Compilation) reads, as follows:

> "An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased from a retailer on or after July 1, 1939, and stored, used or consumed in this state . . . ."

Effective July 1, 1967, the above quoted compensating tax statute was repealed, and Section 72-16A-7, N.M.S.A., 1953 Compilation (1967 Pocket Supplement) became the law in its stead. The material portion of that new section, which continues as the law, reads as follows:

> "For the privilege of using property in New Mexico, there is imposed on the person using property an excise tax equal to three per cent (3%) of the value, at the time of acquisition or of introduction into the state, whichever is later, of the property that was acquired outside the state as the result of a transaction that would have been subject to the gross receipts tax had it occurred within this state."

This new compensating tax statute, which became effective July 1, 1967, contains certain exemptions.

One of these exemptions is in Section 72-16A-12, B. and reads, as follows:

> "Exempted from the compensating tax is the use of property by the governing body of any Indian tribe or Indian pueblo *on Indian reservations or pueblo grants.*"

Likewise, businessmen who sell property to others are permitted by the 1967 law to deduct from their taxable receipts the proceeds from certain of their sales. Thus, we find this provision in Section 72-16A-14, G:

> "Receipts from selling tangible personal property, other than nonfissionable metalliferous mineral ore, to the governing body of any Indian tribe or Indian pueblo *for use on Indian reservations* or pueblo grants, may be deducted from gross receipts."

You will note that our statute limits the tax deductible sales to receipts from sales of tangible personal property to Indian tribes *"for use on Indian reservations."*

It is our information that Sierra Blanca Ski Enterprise is not located on your reservation, and hence our sales or gross receipts tax statutes as well as our compensating tax statutes, apply to that entire operation. Compensating tax statutes would apply, as mentioned above, to all tangible personal property acquired for use in connection with the Sierra Blanca Ski Enterprise.

The sales or gross receipts tax statutes apply to all income of your Tribe received from that skiing operation. This would include not only the income from facilities actually operated by your Tribe, but would

also include the income from facilities owned by you but leased to others who are the actual operators. The income you receive from such leased facilities is taxable income. The tax rate is 3% of the gross amount received by you.

We regret any misunderstanding or inconvenience which may have been occasioned your tribe by reason of the incomplete statement of the law contained in the letter which was sent to you under date of December 13, 1967. The language of that letter only today came to our attention, and hence we hasten to correct any misunderstandings which may have arisen as a result of that letter.

We mention also that the second and third paragraphs of the letter dated December 13, 1967, concerned the tax status of the United States of America and of the State of New Mexico. The matters stated in those two paragraphs do not apply in any way to Indian tribes, and for your purposes may be ignored.

Sincerely yours,
Adolf J. Krehbiel
General Counsel

COMMISSIONER FRANKLIN JONES
BUREAU OF REVENUE
STATE OF NEW MEXICO
SANTA FE, NEW MEXICO

CLAIM FOR REFUND

COMES NOW, the MESCALERO APACHE TRIBE by and through its attorneys, FETTINGER, BLOOM & OVERSTREET, of Alamogordo, New Mexico, and states as its claim for refund the following:

1. That the Mescalero Apache Tribe is an Indian Tribe recognized by the United States as evidenced by the Treaty of July 1, 1852, 10 Stat. 979. See also 15 Indian Claims Commission 532, decided 6/9/67.

2. That the Mescalero Apache Tribe is the owner and operator of Sierra Blanca Ski Enterprises subject to the supervision and control of the United States.

3. That for the period of October 1, 1963, through December 31, 1966, the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises, New Mexico Identification No. 14-703019-00, paid a total of $26,086.47 in taxes to the Bureau of Revenue on gross receipts received from their operation at Sierra Blanca. That said sum of $26,086.47 was paid under the Emergency School Tax Act as amended, being N.M. Session Laws, 1935, Ch. 73.

4. That the financing of the operation at Sierra Blanca, including the purchase of the property used to construct Sierra Blanca Ski Enterprises, was obtained by funds from the United States under 25 U.S.C.A. Section 470.

Exhibit No. 9

5. That the net proceeds received from the operation at Sierra Blanca are used for the educational, social and economic benefit of the Mescalero Apache people.

6. That the Mescalero Apache Tribe is not a person as defined in N.M. Session Laws, 1961, Ch. 189, Section 1, of the Emergency School Tax Act, supra and therefore all taxes paid thereunder were erronously paid.

7. That the Mescalero Apache Tribe is an agency, instrumentality, department, institution or political subdivision of the United States and therefore exempt from the payment of any taxes imposed by the Emergency School Tax Act, supra, based on the following authorities:

A. *United States v. Thurston County*, 143 Fed. 287 (1906).

B. *Choteau v. Burnet*, 283 U.S. 691 (1931).

C. *Clallum County v. United States*, 263 U.S. 341 (1923).

D. *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

8. That the assessment and payment of taxes by the Mescalero Apache Tribe on its operations at Sierra Blanca is inconsistent with the Treaty of July 1, 1852, 10 Stat. 979; 25 U.S.C.A. Section 465 and 25 U.S.C.A. Section 476; U. S. CONST. art. 1, Section 8; U. S. CONST. amend. V; U. S. CONST. amend. XIV, Section 1; N.M. CONST. art. XXI, Section 2; N.M. CONST. art. II, Section 18.

9. That the assessment and payment of these

[illegible] by the Mescalero Apache Tribe is invalid and improper because such payment of taxes interferes with an Indian Tribe's right to self government based on:

A. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

B. *Williams v. Lee*, 385 U. S. 217 (1959).

C. *Warren Trading Post v. Tax Comm'n.*, 380 U.S. 685 (1965).

D. *Ghahate v. Bureau of Revenue*, 80 N.M. 98 (Ct. App.) 451 P.2d 1002 (1969).

E. 25 U.S.C.A. Section 476.

F. *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968).

G. *McCulloch v. Maryland*, supra.

H. *Clallum County v. United States*, supra.

10. That the State of New Mexico has no jurisdiction to tax the Mescalero Apache Tribe because exclusive jurisdiction over such tribe is vested in United States Government, based on:

A. Treaty of July 1, 1852, 10 Stat. 979.

B. N.M. CONST. art. XXI, Section 2.

C. U.S. CONST. art. I, Section 8.

D. *Your Food Stores, Inc. (NSL) vs. Village of Espanola*, 68 N.M. 327, 361 P.2d 950 (1961).

E. *Worcester v. Georgia*, supra.

F. *Williams v. Lee*, supra.

G. *Warren Trading Post v. Tax Comm'n.* supra.

11. That the payment of this tax by the Mescalero Apache Tribe constitutes a denial of equal protection of the laws and if not refunded will constitute a taking of property without due process of law, all in violation and prohibited by the U.S. CONST. amend. V and U.S. CONST. amend. XIV, Section 1 and N.M. CONST. art. II, Section 18.

12. That the Bureau of Revenue is estopped from asserting the taxes paid during this period are due because the Bureau of Revenue has taken the position in its rulings and regulations that an Indian Tribe is not subject to tax on its gross receipts.

Based on the above grounds and authorities, Petitioner hereby requests a refund of the taxes paid under the Emergency School Tax Act for the period October 1, 1963, to December 31, 1966. This claim for refund is being submitted pursuant to Section 72-13-40 of the Tax Administration Act.

[Signatures omitted in printing]

Filed December 23, 1970

Bureau of Revenue
State of New Mexico

In the Matter of the Protest of the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises, I.D. No 14-703019-00, Against Bureau of Revenue Assessment No. 96224 for Compensating Tax for the Period 9/1/63 to 4/30/68; and In the Matter of the Claim for Refund of the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises, for Emergency School Tax for the Period 10/1/63 to 11/31/66.

DECISION AND ORDER

THIS MATTER came for hearing before the Commissioner, and on the basis of the facts and evidence as contained in the stipulation, hereby made a part of the record, the Commissioner decided and ordered that:

1) The protest, which was timely filed, to Bureau of Revenue Assessment Number 96224 by the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises is hereby denied.

2) The claim for refund for taxes paid under the Emergency School Tax Act for the period October 1, 1963 to December 31, 1966, which was timely filed by the Taxpayer, is hereby denied.

3) The Taxpayer is a "person" as that term is defined in the Emergency School Tax Act

[Laws of 1961, ch. 189, Section 1 and Laws of 1963, ch. 206, Section 1], the Compensating Tax Act of 1939 [Laws 1939, ch. 95, Section 2], and the Gross Receipts and Compensating Tax Act (Section 72-16A-3(G), N.M. S.A. 1953 (Supp. 1967) [Laws of 1966, ch. 47, Section 3].

4) The Taxpayer's storage use or other consumption of tangible personal property in New Mexico is not exempted under the Compensating Tax Act of 1939 [Laws 1961, ch. 192, Section 1 and Laws of 1965, ch. 68, Section 1] or under the Gross Receipts and Compensating Tax Act, Section 72-16A-12, N.M.S.A. 1953 (Supp. 1967) [Laws of 1966, ch. 47, Section 12; Laws of 1966, ch. 59, Section 3; and Laws of 1967, ch. 298, Section 1].

5) The imposition of the Emergency School Tax, gross receipts tax, or compensating tax upon the taxpayer is not unconstitutional under either the Constitution of the United States or the Constitution of the State of New Mexico.

6) The Emergency School Tax which Taxpayer paid and then claimed refund upon, was properly imposed and Taxpayer was not exempted from that tax under the Emergency School Tax Act.

7) Assessment Number 96224 is not barred by any Statute of Limitations.

8) The Bureau of Revenue is not estopped from collecting the taxes referred to above by any

provision of the Emergency School Tax Act, the Compensating Tax Act of 1939 or the Tax Administration Act.

Done this 23 day of December, 1970, in Santa Fe, New Mexico.

/s/ Franklin Jones
Franklin Jones
Commissioner of Revenue

Filed January 21, 1971

IN THE COURT OF APPEALS
STATE OF NEW MEXICO

NO. 635

THE MESCALERO APACHE TRIBE,

Appellant,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,

Appellees.

COMPLAINT ON APPEAL

THE MESCALERO APACHE TRIBE, pursuant to Sections 16-7-8(F) and 72-13-39, N.M.S.A., 1953 Comp., hereby appeals from the written decision and order of the Commissioner of the Bureau of Revenue, and states:

1. The order and decision from which this appeal was taken was entered on December 23, 1970, and was mailed to Appellant's attorneys on December 24, 1970. A copy of the order and decision is marked Exhibit "A", attached hereto and incorporated herein.

2. That arrangements have been made with the Commissioner's delegate for preparation of a sufficent number of transcripts of the record of this case,

at the expense of Appellant, including three copies which shall be furnished the Commissioner.

WHEREFORE, APPELLANT PRAYS this Court to reverse the order and decision of the Commissioner by granting Appellant's Claim for Refund and by abating the assessment made by the Commissioner.

[Signatures omitted in printing]

[Exhibit omitted in printing — appearing in prior portion of Appendix]

Rehearing denied Sept. 7, 1971

Certiorari denied 10/6/71

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

[Title omitted in printing]

Filed August 6, 1971

OPINION

HENDLEY, Judge.

The Bureau of Revenue (Bureau) imposed a compensating tax on the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises (Tribe) based upon the purchase price of materials used to construct two ski lifts. The Bureau also imposed an emergency school tax on the gross receipts of the operation of the ski resort. The Tribe protested the compensating tax assessment and also filed a claim of refund for the sums paid under the emergency school tax assessment. The Bureau ruled adversely on the Tribe's protest of the compensating tax assessment and the claim of refund of the school taxes. The Tribe appeals directly to this court pursuant to § 72-13-39, N.M.S.A. 1953 (Supp. 1969).

We affirm.

This appeal is based upon a stipulation of facts entered into by the Tribe and the Bureau, a summary of which is as follows. The Tribe is a treaty tribe residing on reservation lands situated within the counties of Lincoln and Otero in the State of New Mexico and has adopted a constitution in accordance with

governmental regulations. The ski resort is also located in Lincoln and Otero Counties and is on lands belonging to the United States Forest Service under a thirty year lease to the Tribe, except for some of the cross-country ski trails which are on reservation lands. No part of the ski resort buildings or equipment are located within the boundaries of the Tribe's reservation. The basic purpose of the ski resort is to provide revenue which is used for educational, social and economic welfare of the Tribe. The ski resort also provides a job training center for approximately twenty to thirty tribal members. The purchase and construction of the ski resort was totally financed by a loan from the Federal Government pursuant to 25 U.S.C.A. § 470. The approval of the Bureau of Indian Affairs of the Department of Interior is required for the ski resort budget for each fiscal year, leasing of equipment or other property, leasing facilities to concessionaires, plans and designs for construction of additional facilities or improvements, disposal of property other than expendable items, form and contents of monthly interim reports and accounting records and other related areas dealing with the ski resort.

On appeal the Tribe asserts: (1) the State has no authority to tax the Tribe; (2) assuming it has authority to tax the Tribe, the State, in its statutes, has not attempted to tax the Tribe; and (3) the Tribe is exempt from taxation because it is a federal instrumentality.

I. AUTHORITY TO TAX

The Tribe contends that the State has no authority to tax because: (a) exclusive jurisdiction over

the Tribe is vested in the Federal Government; (b) it is inconsistent with the Treaty between the Tribe and the Federal Government; and (c) it interferes with the Tribe's right to self-government.

(a) Exclusive Jurisdiction.

It is the Tribe's contention that the Treaty between the Tribe and the United States Government, which became effective March 25, 1883, vests exclusive jurisdiction over the Tribe in the Federal Government. Article I of the Treaty states:

> "Article 1. Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit."

The Tribe further contends that this argument is buttressed by Article I, Section 8 of the United States Constitution which states that the United States Congress shall have power "To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes; . . ."

We agree with the Tribe on this general proposition, but we must call attention to the fact that the Tribe submitted to the United States "power and authority." Subsequently, the United States Congress, on June 20, 1910, 36 Statutes at Large, 557, ch. 310, enacted the Enabling Act for New Mexico. Section 2, second, after stating that Indian land shall be under

the absolute jurisdiction and control of the Congress of the United States, stated in part:

> ". . . [B]ut nothing herein, or in the ordinance herein provided for, shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as congress has prescribed or may hereafter prescribe."

This Enabling Act is a specific grant of power which was later incorporated into Article XXI, Section 2, of the New Mexico Constitution wherein the almost identical language was adopted.

Consequently, by virtue of the Enabling Act the Federal Government permitted the State of New Mexico to tax, ". . . as other lands and other property are taxed, any lands and other property outside of an Indian reservation. . . owned or held by any Indian."

The Tribe contends that under Article VI, (Clause 2) of the United States Constitution, when there is a conflict between a Treaty and the provision of a State Constitution or statute, regardless of whether the State constitutional or statutory provision is prior to or subsequent to the making of the Treaty,

the Treaty will control. United States v. Belmont, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937). We agree with this general proposition, however, we do not find the Treaty to be in conflict with the provisions of the New Mexico Constitution or any of its statutes when the tax is on lands or properties located off Indian land. The Treaty submits the Tribe to the laws of the United States, and the Enabling Act permits New Mexico to tax in this situation.

The Tribe contends the lease of the Federal Forest Service lands was an acquisition of land under 25 U.S.C.A. § 465, which permits the Secretary of Interior to acquire lands within or without existing reservations for the purpose of providing lands for Indians. 25 U.S.C.A. § 465 provides that title to "any lands or rights acquired" pursuant to 25 U.S.C.A. § 470 shall be exempt from State taxation. The purchase and construction of the ski resort was financed by a loan under 25 U.S.C.A. § 470. Assuming the Tribe's leasehold rights and its interest in the ski resort facilities are land, or rights acquired in land, a proposition we do not decide, the exemption from State taxation is also to land, or rights acquired in land. The tax involved here applies neither to land nor to rights acquired in land. The tax under the old "compensating or use tax" is on tangible personal property, see § 72-17-3, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2) and under the Emergency School Tax Act on the privilege of engaging in business activities within New Mexico. See § 72-16-4.1, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2); see Edmunds v. Bureau of Revenue, 64 N.M. 454, 330 P.2d 131 (1958). The exemption under 25 U.S.C.A. § 465 does not apply in this case.

We have considered the Tribe's other contentions and cited cases, but find them distinguishable on the facts and under the law above cited.

(b) The Taxation Being Inconsistent with the Treaty.

The Tribe relies upon Articles 9, 10 and 11 of the Treaty when read with Article 1, cited above, for the proposition that the Treaty imposed a duty on the United States Government to pass legislation and do other acts to insure the permanent prosperity and happiness of the Tribe and that the United States Government is duly bound by this Treaty to make donations, gifts and implements to the Tribe. The Tribe contends that it would be inconsistent with those purposes for the State of New Mexico to be allowed to disrupt the scheme of the Federal Government by permitting an imposition of New Mexico taxes on the Tribe.

We fail to see the merit of the argument. In reviewing the other Articles of the Treaty, the apparent purpose of the Treaty was to insure the Tribe of certain lands and of certain freedoms on tribal lands but it did not include freedom from a situation as disclosed by the facts of this case.

We do not pass judgment on the contention of the Tribe that the Federal Government is interested in the financial success of the Tribe's operation of a ski resort; however, we fail to see, in light of the foregoing Treaty and Enabling Act provisions, how the Federal Government intended to exempt the Tribe from taxation for activities and operations occurring

off Indian lands. The Enabling Act itself denies this contention.

(c) Interference with Tribe's Right of Self-Government.

We agree with the Tribe's contention that if the imposition of a State tax on the Tribe interferes with the Tribe's right to reservation self-government the tax must fail. Ghahate v. Bureau of Revenue, 80 N.M. 98, 451 P.2d 1002 (Ct. App. 1969). The Tribe claims such interference in this case even though the taxes involved arose from and because of operations conducted by the Tribe on non-Indian land. The claim is based on the fact that revenue derived from the ski resort operation is used for the welfare of the Tribe and the resort provides job training for members of the Tribe. These facts show no interference with reservation self-government. The Tribe contends, however, that it *might* interfere because the power to tax is the power to destroy and: "The purpose for which the appellant entered into the ski resort operation is being frustrated and possibly could even be totally defeated if New Mexico is allowed to tax the operation." There are no facts showing a present frustrated purpose; the remainder of the argument is no more than speculation. There being no factual basis for the claim, it is rejected. Compare Village of Kake v. Egan, 369 U.S. 60, 80 S. Ct. 562, 7 L.Ed.2d 573 (1962); McClanahan v. State Tax Commission, 414 Ariz. App. 452, 484 P.2d 221 (1971).

2. AUTHORITY TO TAX THE TRIBE WHICH THE STATE HAS NOT ATTEMPTED TO TAX.

It is the Tribe's contention here that since it is not specifically named in § 72-17-2(e), N.M.S.A. 1953 (Repl. Vol. 1961) of the Compensating Tax Act, and § 72-16-2(A), N.M.S.A. 1953 (Repl. Vol. 1961) of the Emergency School Tax Act (both repealed July 1, 1967, and both taxes were for periods of time prior to the repeal), that they are excluded on the basis that general acts do not apply to State statutory authority to tax the Tribe. See Chouteau v. Commissioner of Internal Revenue, 38 F.2d 976 (1930); compare Southern Union Gas Company v. New Mexico Public Service Commission, 82 N.M. 405, 482 P.2d 913 (1971).

No claim is made that the Tribe does not come within the definition of "person" in §§ 72-17-2(e) and 72-16-2(A), supra. The claim is simply that to be taxable, the Tribe must have been specifically named. We disagree. Whatever may be the current validity of the concept that Indians could not be taxed unless specifically named, the Enabling Act specifically permitted the taxation "as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian. . . ." With this specific federal legislative permission, we see no basis in reason, in New Mexico, for the concept that Indians must be specifically named to be included within a statute of general application. The Enabling Act states that Indian property, in the situation in this case, is to be taxed as other property is taxed.

3. TRIBE EXEMPT FROM TAXATION BECAUSE IT IS A FEDERAL INSTRUMENTALITY.

It is the Tribe's contention here that even assuming New Mexico does have authority to tax the Tribe, and assuming further that the Tribe comes within the definition of "person" in the taxing statutes, the Tribe is exempt because it is a federal instrumentality.

The Tribe cites the *Handbook on Federal Indian Law*, U.S. Printing Office (1958) at page 853, for the proposition that insofar as the instrumentality doctrine is concerned, it relates to Indians, their property and their affairs. We do not agree with the Tribe on this general proposition. The Tribe's argument is based on the fact that it is a Tribe and its ski resort operation is financed and supervised by the Federal Government. These facts, in our opinion, are insufficient to support a conclusion that the ski resort is virtually an arm of the United States Government, see dissenting opinion of Justice Marshall in Agricultural Nat. Bank v. Tax Commission, 392 U.S. 339, 88 S.Ct. 2173, 20 L.Ed.2d 1138 (1963), and cases cited therein; certainly the ski resort is not essential in the performance of governmental functions, but even if the ski resort could be considered a federal instrumentality, the immunity of the resort from taxation is removed by the provisions of our Enabling Act pro-

vously discussed in this opinion.

Affirmed.

IT IS SO ORDERED.

/s/ William R. Hendley
JUDGE

I CONCUR:

/s/ Joe W. Wood C.J.

Louis R. Sutin, J. (specially concurring)

SUTIN, Judge (Specially concurring)

I specially concur only because the Mescalero Apache Tribe or Sierra Blanca Ski Enterprises, I.D. No. 14-703019-00, which owns the ski resort, is a federal Indian chartered corporation, pursuant to 25 U.S.C.A., §§ 477 and 470.

The fact of being a chartered corporation does not appear in the stipulation. Nevertheless, it states:

* * * *

> 7. The purchase and construction of the ski resort was financed completely by a loan to the Tribe by the federal government under 25 U.S.C.A., Section 470.

25 U.S.C.A., § 470 provides that the Secretary of the Interior "... may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, ..."

25 U.S.C.A., § 477 provides that the Secretary of the Interior may issue a charter of incorporation to a tribe. It further provides:

> Such charter may convey to the *incorporated tribe* the power to purchase ..., or otherwise own, hold, manage, operate, and dispose of property of *every* description, real and personal, ... *and such further powers as may be incidental to the conduct of corporate business*, not inconsistent with law, ... Any charter so issued shall not be revoked or sur-

[illegible] except by Act of Congress. [Emphasis added.]

Article XI, Section 1(a) of the Tribe's Revised Constitution is a part of the stipulation. It provides that the Mescalero Apache Tribal Council has the duty and power to transfer tribal property and other assets to tribal corporations.

The Mescalero Apache Tribe states in its reply brief:

> The issue of a federally chartered corporation under Section 477 is not present in this case.

To me, this constitutes an admission that the Tribe, or Sierra Blanca Ski Enterprises is an Indian chartered corporation. This corporation should be taxed.

The Notice of Assessment of Taxes by the Commissioner was made to Sierra Blanca Ski Enterprises, not to the Tribe. The title of the Protest of Assessment filed by the Tribe refers to Sierra Blanca Ski Enterprises. The Tribe stated it was the "owner and operator of Sierra Blanca Ski Enterprises." In the title to the stipulation of the facts and the decision and order of the Commissioner, it is described as "Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises, I.D. No. 14-703019-00." The Tribe was taxed in this name because probably it led the Commissioner to believe it was not a chartered corporation.

If the assumptions of corporate life in this specially concurring opinion are wrong, and called to the attention of this court on motion for rehearing, I will dissent. I do not agree that an Indian Tribe is

subject to payment of the state compensating tax a school tax assessments.

This appears to be the first state tax case against an Indian chartered corporation or tribe. Let us take a look at the history of corporate Indian tribes.

Cohen's Handbook of Federal Indian Law, p.27 states:

> In the narrow sense in which the term is frequently used, a corporation is something chartered by a government, and in this sense only those Indian tribes which have been chartered by some government, e.g., the Pueblos of New Mexico incorporated by territorial legislation, and the tribes incorporated under section 17 of the Act of June 18, 1934, [25 U.S.C.A., § 477] are to be considered corporations.

See United States v. Lucero, 1 N.M. 422, 438 (1869).

In Cohen's, supra, p. 278, 279, the author says:

> Thus it has been administratively determined that the Pueblos of New Mexico are entitled to receive grazing privileges under the Taylor Grazing Act, under the clause in section 3 of that act conferring such rights upon "corporations authorized to conduct business under the laws of the State." The principle involved would appear to be equally applicable to any Indian tribe which has a recognized corporate status, either under the Act of June 18, 1934, or otherwise.

See also Cohen's, supra, p.399, wherein it is said:

> The corporate status of the Pueblos has been recognized in many cases.

The corporate status of Pueblo Indian communities, created in 1847, is still alive in New Mexico. Section 51-17-1, N.M.S.A. 1953 (Repl. Vol. 8, pt. 1). This section gave the Indian Pueblos the status of bodies politic and corporate, and, as such, empowered them to sue in respect of their lands. Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 63 L.Ed. 504, 39 S.Ct. 185 (1918); Garcia v. United States, F.2d 873 (10th Cir. 1960).

In 1904, the Supreme Court of New Mexico held taxable the lands of the Pueblo Indians in New Mexico. Territory v. Delinquent Taxpayers, 12 N.M. 130, 76 P. 307 (1904).

The Tribe claims 25 U.S.C.A., § 465 is a restraint on state's activities. This section applies to title to lands taken in the name of the United States in trust for the Indian tribe or individual Indian. Such lands are exempt from state and local taxation. Chartered Indian corporations are not covered by this section. But see, Martinez v. Southern Ute Tribe, 150 Colo. 524, 374 P.2d 691 (1962).

Under the state taxing acts, a "person" includes a corporation. They do not exclude Indian chartered corporations. Neither is the Indian chartered corporation exempt from payment of taxes. If it were intended to be an instrumentality of the United States, it would have been so stated in 25 U.S.C.A., § 477.

It might be noted that § 72-13-79, N.M.S.A. 19[illegible] (Repl. Vol. 10, pt. 2, Supp. 1969), of the Tax Administration Act, adopted in 1965, provides:

> Liens will attach or levy may be made by terms of any provision of the Tax Administration Act . . . to or on property belonging to the United States of America or to an Indian tribe, an Indian pueblo or any Indian only to the extent allowed by law.

Here again, the Indian chartered corporation is omitted.

Some states "have been given jurisdiction by federal statute over the reservations within their borders. The tribes within these states no longer exercise governmental functions independent of the state. Morever, Congress has authorized all states to extend jurisdiction over tribes within their borders by official act" with tribal consent. 25 U.S.C.A., §§ 1321-22 (Supp. 1970); 82 Harvard Law Review 1343. New Mexico has not moved toward assumption of jurisdiction.

The Mescalero Apache Tribe has left the confines of its reservation. It has donned the robes of a corporation to join its competitors in business. It stands high in its tradition as a separate "nation." It now stands strong in its business and cultural development. As it earns money from citizens of this country it should carry the same burdens of taxation as its competitors. It may even continue in additional ventures in business in every phase of corporate life. New Mexico should welcome this adventure as no

s it has welcomed others to come in the last 123 ns.

In my opinion, an Indian chartered corporation erating on non-Indian land is subject to the com- nsating tax and school tax of this state.

For these reasons, I specially concur.

/s/ Lewis Sutin
JUDGE

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

Filed August 6, 1971

[Title omitted in Printing]

Order of Court

This cause having heretofore been argued, s
mitted and taken under advisement and the Co
being now sufficiently advised in the premises,
nounces its decision by Judge William R. Hend
Chief Judge Joe W. Wood and Judge Lewis R. Sa
(specially concurring) affirming the judgment
the Bureau of Revenue for the reasons given in t
opinion of the Court on file.

NOW, THEREFORE, IT IS CONSIDERE
ORDERED AND ADJUDGED by the Court that t
judgment of the Bureau of Revenue whence th
cause came into this Court, be and the same is here
affirmed and the cause is remanded to the said Co
missioner of the Bureau of Revenue for such furth
proceedings as may be proper, if any, consistent a
in conformity with said opinion.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

[Title omitted in Printing]

Filed August 26, 1971

MOTION FOR RE-HEARING

COMES NOW the Appellant, the MESCALERO APACHE TRIBE, respectfully moves the Court to withdraw its Opinion entered in the instant case and filed on August 6, 1971, and re-hear this matter, and as grounds therefor, would show that the Court erroneously applied certain decisions and statutes to the following points:

I. The State of New Mexico has no authority to tax the Mescalero Apache Tribe.

II. The Tribe does not come within the definition of "person" of the New Mexico statutes and is not named in in the taxing statutes of New Mexico.

III. The Tribe is exempt from taxation because it is a federal instrumentality.

IV. The Tribe is a federally chartered Indian Tribe under 25 U.S.C.A. 476.

As further grounds for re-hearing, the Appellant would respectively refer the Court to the accompanying Brief.

[Signatures and Brief omitted in printing]

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

[Title omitted in Printing]

Tuesday, September 7, 1971

ORDER DENYING REHEARING

This cause coming on for hearing upon Appellant's motion for a rehearing, and the Court having considered said motion and briefs of counsel, and being now sufficiently advised in the premises,

IT IS ORDERED that said motion for rehearing be and the same is hereby denied.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

[Title omitted in printing]

APPLICATION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

Filed September 24, 1971

The Mescalero Apache Tribe, Petitioner herein, respectfully petitions the Supreme Court to review the opinion of the Court of Appeals, by Writ of Certiorari. A copy of said opinion is attached to this Application. As grounds for a Writ of Certiorari the Petitioner would show the Court, that:

1. The date of the decision of the Court of Appeals was August 6, 1971. A timely Motion for Rehearing was filed and an Order denying the Motion for Rehearing was entered September 7, 1971. Final action by the Court of Appeals was on September 7, 1971.

2. The question presented for review is:

May the Bureau of Revenue of the State of New Mexico tax the Mescalero Apache Tribe, an Indian Tribe, in the Tribe's operation of Sierra Blanca Ski Enterprises?

3. The facts material to the question presented are as follows:

The Mescalero Apache Tribe is an Indian Tribe which has a treaty with the United States of America, as evidenced by The Treaty of July 1, 1852, 10 STAT. 979. Pursuant to 25 U.S.C.A. Section 476, the

Mescalero Apache Tribe in 1934 adopted a consti-
tion and is a functioning, viable Indian Tribe und
the control and authority of the United States o
America.

Sierra Blanca Ski Enterprises is a ski resort lo-
cated in Otero and Lincoln Counties, New Mexico, an
is exclusively owned and operated by the Petitioner.
The ski resort is on land belonging to the U. S. Fore
Service which had been leased to the Petitioner for a
period of thirty (30) years. The basic purpose of the
ski resort is to provide revenue to the Petitioner in
lieu of raising revenue through the taxation of tribal
members or in some other manner. The revenue from
the ski resort is utilized for the education, social and
economic welfare of the Mescalero Apache people. The
ski resort also provides a job training center for the
Mescalero Apache people.

The purchase and construction of the ski resort
was financed completely by a loan to the Petitioner
from the federal government under 25 U.S.C.A., Sec-
tion 470.

The Bureau conducted an audit in May of 196
which resulted in Assessment No. 96224 being issued
against the Petitioner for compensating tax in the
amount of $5,887.19, plus interest of $893.82 and pe-
nalties of $588.73. The assessment can be broken down
for the following periods: For September 1, 1963, to
December 31, 1965, principal - $4,925.01; penalty -
$492.50; interest $232.89. For January 1, 1966, to April
30, 1968, principal - $962.18; penalty - $96.23; interest
$660.92. The assessment can also be broken down as

follows: For September 1, 1963, to August 31, 1965, principal - $776.74; penalty - $77.67; interest - $167.97. For September 1, 1965, to April 30, 1968, principal - $5,110.45; penalty - $511.05; interest - $725.85. The compensating tax assessed was a result of the compensating tax being applied against the purchase price of materials which were used to construct two ski lifts at the ski resort. At the time the audit was conducted and the assessment issued, the ski lifts had been completed and were permanently attached to the realty.

All the materials against which the compensating tax was assessed were purchased with money borrowed by the Petitioner from the federal government pursuant to 25 U.S.C.A. Section 470, and the purchase of all such materials were subject to and were approved by the Bureau of Indian Affairs of the federal government.

4. The basis for granting the Writ is that:

(a) The decision of the Court of Appeals holding that the Petitioner was subject to the assessment and payment of taxes on its operations at Sierra Blanca is in conflict with the following provisions of the United States Constitution, the New Mexico Constitution and Federal Statutes:

(1) The Treaty of July 1, 1852, 10 STAT. 979.

(2) 25 U.S.C.A. Section 465.

(3) 25 U.S.C.A. Section 470.

(4) 25 U.S.C.A. Section 476.

(5) The United States Constitution Article I, Section 8.

(6) The United States Constitution Amendment V.

(7) The United States Constitution Amendment XIV, Section 1.

(8) The New Mexico Constitution Article XXI, Section 2.

(9) The New Mexico Constitution Article II, Section 18.

(10) The Enabling Act for New Mexico, June 20, 1910, 36 Statutes at Large, 557, Ch. 310.

(b) The decision of the Court of Appeals holding that the Petitioner is not an instrumentality of the federal government is in conflict with the following authorities:

(1) United States v. Rickert, 188 U.S. 432 (1903).

(2) United States v. Thurston County, 143 Fed. 287 (1906).

(3) Choteau v. Burnet, 283 U.S. 691 (1931).

(4) Clallum County v. United States, 263 U.S. 341 (1923).

(5) McCulloch v. Maryland, 4 Wheat. 316 (1819).

(6) The United States Constitution, Article I, Section 8.

(c) The decision of the Court of Appeals is in conflict with the case of *Ghahate v. Bureau of Revenue*, 80 N.M. 98, 451 P.2d 1002 (Ct. App., 1969), in that the decision denies that the tax interferes with an

Indian Tribe's right to self government. This denial of the Petitioner's right to self government by the decision of the Court of Appeals is in conflict with the following additional authorities:

(1) Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832);

(2) Williams v. Lee, 385 U.S. 217 (1959).

(3) Warren Trading Post v. Tax Commissioner, 380 U.S. 685 (1965).

(4) 25 U.S.C.A. Section 465.

(5) 25 U.S.C.A. Section 470.

(6) 25 U.S.C.A. Section 476.

(7) Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 443 P.2d 421 (1968).

(8) McCulloch v. Maryland, 4 Wheat. 316 (1819).

(9) United States v. Rickert, 188 U.S. 432 (1903).

(d) The decision of the Court of Appeals is in conflict with *Your Food Stores, Inc., v. Village of Espanola*, 68 N.M. 327. 361 P.2d 950 (1961), in that the decision of the Court of Appeals denies the exclusive jurisdiction over the Petitioner as vested in the United States Government, further authorities are as follows:

(1) The Treaty of July 1, 1852, 10 STAT. 979.

(2) The New Mexico Constitution Article XXI, Section 2.

(3) The United States Constitution, Article I, Section 8.

(e) The decision of the Court of Appeals holds that the Petitioner is "a person" as defined in the applicable tax statutes. This is in conflict with *Southern Union Gas v. New Mexico Public Service Commission*, ... N.M. ..., 482 P.2d 913 (1971) and The Enabling Act for New Mexico, June 20, 1910, 36 Statutes at Large, 557, Ch. 310.

(f) The question presented for review involves a significant question of law, in particular the interpretation of the following constitutional provisions as they apply to the Petitioner:

(1) The United States Constitution Article I, Section 8.

(2) The United States Constitution Amendment 5.

(3) The United States Constitution Amendment 14, Section 1.

(4) The New Mexico Constitution Article XXI, Section 2.

(5) The New Mexico Constitution Article II, Section 18.

(g) The issue is of substantial public interest because this is a case of first impression in New Mexico involving the efforts of the State to tax an Indian Tribe, and its impact will have a direct effect upon the Petitioner, other Indian Tribes, the Federal Government and the taxing procedures of the State of New Mexico.

5. The question presented for review was presented to the Court of Appeals in Points I, II and III

of the Petitioner's (Appellant's) Brief in Chief and in Points I, II, III and IV of Petitioner's (Appellant's) brief accompanying the Motion For Rehearing.

[Signatures omitted in printing]

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

Friday, October 8, 1971

[Title omitted in printing]

FINAL ORDER

This cause having heretofore been submitted and taken under advisement and an opinion of the Court having been handed down on the 6th day of August, 1971, motion for rehearing having been denied on on September 7, 1971, petition for writ of certiorari having been denied on October 6, 1971;

IT IS, THEREFORE, ORDERED That the Order of this Court entered herein on the 6th day of August, 1971, affirming the judgment of the Bureau of Revenue, be and the same is hereby made final.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-738

THE MESCALERO APACHE TRIBE,

Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

FETTINGER & BURROUGHS

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Counsel for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No._____

THE MESCALERO APACHE TRIBE,

Petitioner,

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FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

The Mescalero Apache Tribe petitions for a Writ of Certiorari to review the judgment of the Court of Appeals of the State of New Mexico, entered in this case on August 8, 1971.

Opinion Below

The Opinion of the Court of Appeals of the State of New Mexico has not as yet been reported, but will appear in 82 N.M. _____, _____ P. 2d _____ (Ct. App. 1971). A copy of said Opinion is marked Appendix A and attached to this Petition.

Jurisdiction

The Mescalero Apache Tribe is engaged in a business enterprise, a ski resort, which by necessity is located primarily on United States lands adjacent to the Mescalero Apache Reservation. The State of New Mexico sought to tax: (1) The personal property owned by the Tribe and used in this business, which is wholly owned and operated by the Mescalero Apache Tribe; (2) the gross receipts of the Tribal enterprise, a privilege tax, on the privilege of doing business in New Mexico. The compensation tax was imposed pursuant to Section 72-17-3, N.M.S.A., 1953 Comp., and the gross receipts tax was assessed under

the Emergency School Tax Act as amended, being Sections 72-16-1 through 72-16-47, N.M.S.A., 1953 Comp.

A timely Claim for Refund and Protest of Assessment was filed with the Commissioner of the Bureau of Revenue of the State of New Mexico in Santa Fe, New Mexico by the Mescalero Apache Tribe. The Protest and Claim for Refund were denied by the Commissioner of the Bureau of Revenue on the 23rd day of December, 1970, holding that the Tribal Interests were taxable. The matter was appealed to the Court of Appeals of the State of New Mexico pursuant to Sections 16-7-8 (F) and 72-13-39 N.M.S.A., 1953 Comp. On August 6, 1971, the Court of Appeals of the State of New Mexico affirmed the decision of the Commissioner of the Bureau of Revenue, by a Court divided on rationale. A timely Motion for Re-hearing was filed and an Order denying the Motion for Re-hearing was entered September 7, 1971. A timely Petition for Writ of Certiorari was filed with the Supreme Court of the State of New Mexico on September 28, 1971 and an Order Denying the Petition for Writ of Certiorari was entered on October 6, 1971. This was the final order entered in this cause by the New Mexico appellate courts. This Court has jurisdiction of this Petition for Writ of Certiorari under 28 U.S.C. Section 1257 (3).

Questions Presented

1. Can the State of New Mexico, acting under state law, validly impose a personal property tax upon personal property owned by an Indian tribe and utilized in a Tribal operated enterprise, where said Tribe has a treaty with the federal government, is governmentally structured pursuant to the Indian Reorganization Act, and has established the enterprise pursuant to federal statutes for Indian economic development?

2. Can the State of New Mexico, acting under state law, validly impose its gross receipts tax, a privilege tax, upon an Indian tribe operated enterprise, where said Tribe has a treaty with the federal government, is governmentally structured pursuant to the Indian Reorganization Act, and has established the enter-

prise pursuant to federal statutes for Indian economic development?

Constitutional Provisions, Statutes, Orders and Regulations Involved

The relevant Constitutional provisions, statutes, orders and regulations are as follows:

1. The U.S. Const. Art. I, Sec. 8, Cl. 3:

"To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

2. The Treaty of July 1, 1852, 19 Stat. 979, between the United States of America and the Mescalero Apache Tribe. The Treaty is attached as Appendix B to this Petition.

3. 25 U.S.C. 465:

"The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall be taken in the

name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

4. 25 U.S.C. 470:

"There is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $20,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established.

5. The Enabling Act For New Mexico, June 20, 1910, 36 Statutes at Large, 557, Ch. 310, Sec. 2, Cl. 2:

"That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein or in the ordinance herein

provided for, shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian Reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or acquired as aforesaid or may be granted or confirmed to any Indian or Indians under any act of congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as congress has prescribed or may hereafter prescribe.

6. The other statutes and regulations are too long for reproduction in this portion of the brief and are attached as Appendix C.

Statement of the Case

The Petitioner in this case is the Mescalero Apache Tribe, a tribe of Indians which entered into a treaty with the United States of America in 1852. The Mescalero Apache Tribe has a Reservation, part of aboriginal homelands, the remainder of which were ceded to the United States by the Treaty of 1852. Pursuant to 25 U.S.C. Section 476, the Mescalero Apache Tribe in 1936, adopted a constitution (T. 13), and has continued to be a viable, functioning Indian Tribe performing governmental functions under this constitution, tribal ordinances and applicable federal statutes.

Over the last several years the Mescalero Apaches have attempted to develop the Reservation and lands near the Reservation for the economic betterment of all members of the Tribe. In furtherance of this desire for economic independence and for the general well being of the Tribe, the Tribe developed a ski resort located in Otero and Lincoln Counties, New Mexico. The name of this resort is Sierra Blanca Ski Enterprises and it is exclusively owned and operated by the Mescalero Apache Tribe. The ski resort is on lands belonging to the United States Forest Service which have been leased to the Tribe for a period of thirty years. The ski resort area is bordered on the South by the Tribe's Reservation and some of the cross-country ski trails

are located on the Reservation, but the majority of the ski resort is located on federally leased lands.

The lease with the United States Forest Service was entered by the Tribe pursuant to Article XI Section 1 of the Tribe's constitution (T. 13). Though these lands are located outside the physical boundaries of the Reservation, they are under federal control through the Department of the Interior, the same as any lands located within the actual boundaries of the Reservation. The basic purpose of the ski resort is to provide revenue for the Tribe in lieu of raising revenue through the taxation of Tribal members or in some other endeavor. The revenue from the ski resort is being used for educational, social and economic welfare of the Mescalero Apache Tribe. The ski area also provides a job training center for the Mesclareo Apache people and approximately 20 to 30 tribal members are employed at the ski resort in a job training capacity (T. 6).

After a feasibility study by the federal government, the Tribe secured financing from the federal government under 25 U.S.C. Section 470.

In May of 1968, after the improvements had been made and the ski resort was in operation, the Bureau of Revenue of the State of New Mexico conducted an audit. All the materials against which the tax was assessed were purchased with money borrowed by the Tribe from the federal government pursuant to 25 U.S.C. Section 470, and the purchases of all such materials were subject to and were approved by the Bureau of Indian Affairs, all as outlined in 25 C.F.R. pt. 91. Not only were the materials purchased with money borrowed by the Tribe from the federal government, but also the plans and specifications for the construction of the ski lift at the ski resort were approved by the federal government. (T. 16).

As a result of such assessment, a written protest was timely filed by the Tribe as required by Section 74-13-38 of the Tax Administration Act for the State of New Mexico. The procedures as outlined in the jurisdiction statement above were then followed. The facts were stipulated by both parties at the time of the hearing before the Commissioner, and the same stipulated facts have governed

this case at each step of the appellate process (T. 5-9).

This economic development was a further step by this progressive Tribe to make itself self-reliant; fulfilling the original basic reasons for federal power over Indians in that it protects Indian resources and leads to economic development. This purpose was acknowledged by the state in this very enterprise (T. 6). The action of the Bureau of Revenue of the State of New Mexico not only challenges this self-reliance, but flaunts the very existence of the Petitioner as a body politic — a sovereign Indian tribe under the control of the federal government; by asserting the tax the state is saying it can assert control over the Petitioner. For years the Petitioner has struggled to develop, and has turned to the federal government for assistance and direction. The federal government has responded with legislation, regulations and Bureau of Indian Affairs control to see that this economic development was not impaired.

Tribal property was not subject to state taxation when the horse and plow were utilized for economic development. The means have changed, such as the ski enterprise in this case, but the purpose is unchanged. This is a natural direction for the Petitioner to turn due to the Treaty, federal control of the Reservation and the constitutional structure of the Tribe. Under such control it was only normal that the Tribe turn to the federal government when seeking means of implementing plans for economic development; funds available under 25 U.S.C. Section 470 appeared as a natural avenue for this development. It is through the funds available under 470 that the resort area was constructed and another leg to economic stability was added to the life of the Petitioner.

In years gone by, roaming the land and using the resources of nature have been the way of life for the Mescalero Apache people; now they are attempting to utilize these land resources for Tribal development in a way acceptable to the white man's civilization. As the Mescalero has turned from roaming the land to developing the land, he has always turned to the federal government for guidance and assistance. It would be unfair to this Peti-

tioner to see this trust relationship established over one hundred years ago and nurtured by the protection of the federal government, destroyed by the tax efforts of the State of New Mexico.

Reasons for Granting the Writ

1. The Petitioner, like other Indian Tribes, is starting to emerge through economic development. Economic development means continuity of tribal integrity and customs and assures tribal sovereignty. As this development has precedent, states have cast a longing eye to this growth as a new source of tax revenue. This has led to the present confrontation between a sovereign Tribe and the State of New Mexico; that which the federal government has protected and nurtured through the Commerce Clause, a Treaty and federal statutes, is now being threatened by state tax activity. This is a crucial confrontation, as the Tribe must be able to develop economically if it is to survive.

Both these taxes represent a direct impairment of Petitioner's economic development. (a) It is a direct tax levied on the Tribe's conduct of the business and is actually assessed against the Tribe itself. (b) The amount of tax on a recurring basis over the life of the lease will have a direct impact on the Tribe. As stated in the Stipulation of Facts (T. 7 and 8), the gross receipts tax averages approximately $12,500.00 a year and the compensation tax averages approximately $2,500.00 a year. Extended over the thirty year life of the lease, these taxes would create a tax burden of approximately $450,000.00. (c) Such a tax if allowed would open the door to other state taxes and lead to the eventual destruction of the tribal entity.

2. The Decision below conflicts with the Commerce Clause of the Constitution and the Petitioner's Treaty, both of which vest the federal government with exclusive jurisdiction over the Petitioner. The Treaty establishes a pattern of rules under which the Tribe will exist and establishes the initial trust relationship between the appellant and the federal government.

Whether the enterprise is located on tribal land or not is not the criteria to determine if the state may tax the

Tribe. The relevant factors are whether the enterprise is under federal control and regulation and is meeting an obligation under federal Indian policy. The statutes and regulations indicated throughout this brief show that the conduct, control and implementation of this enterprise are all under the direction of the Department of the Interior. The purpose is economic development and cultural stability. The purpose and control place this enterprise under the guidance of the federal government, to the exemption of the state, despite its location off the tribal lands proper.

The policy of protecting the status of Indian tribes is the same on these lands as it is on lands physically within the tribal boundaries, as it is preserving the trust relationship and allowing Indian competency and self-development to continue. *Squire v. Capoeman*, 351 U.S. 1, 76 S. Ct. 611, 100 L.Ed. 83 (1956). Even the actual use is consistent with federal Indian policy as it gives the Tribe a source of revenue that benefits the members of the Tribe and establishes a training ground in which Tribal members can develop commercial skills.

The United States has controlled Indian relations through the powers established in the Commerce Clause, U.S. Const. Art. I, Sec. 8, Cl. 3, which provides that Congress shall regulate commerce with the Indian Tribes. It is this regulatory power that was used for over 100 years to pre-empt state controls of liquor sales to Indians, on and off the Reservation. *United States v. Holliday*, 70 U.S. (3 Wall) 407, 18 L.Ed. 182 (1866); *United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 23 L.Ed. 846 (1876).

Just as Congress previously extended federal control over liquor outside the boundaries of the Reservation to protect its beneficiaries whenever the interest of trade and commerce required it, Congress has now extended its economic control of Indian activities outside the Reservation to benefit its Indian beneficiaries. Cohen, *Federal Indian Law*, P. 91: "The power of Congress to regulate commerce with Indian Tribes has for its field of action the entire nation, not just the Indian country." This policy is performed under the Commerce Clause and implemented by specific statutes and regulations relating to Indians. 25 U.S.C. 465,

25 U.S.C. 470 and 25 C.F.R. pt. 91 indicate this federal control; it is under the protection of these statutes that the Tribe secured the funds to make the economic development that is now being threatened by the State.*

The lease upon which this enterprise is located was acquired pursuant to Article XI Sec. 1 of the Petitioner's Constitution (T. 6). Just as any other land or interest in land when utilized for the Tribal benefit, this leased land is performing a function of the trust interest since its use is approved by the Secretary of the Interior and it is utilized for the economic well being and social and economic improvement of the Tribe. The Petitioner suggests these leased lands have the same status as trust lands since utilized pursuant to the Tribal Constitution, under economic development statutes of the federal government and within Tribal jurisdiction as outlined in the Tribal Constitution, Article II (T. 13). 25 U.S.C. 465 refers to this interest as one held in trust by the United States for the Indian tribe. This theory further implements federal Indian policy by securing economic growth and preserving Indian culture.

Congress has drawn no distinction between interest on the Reservation and those off when implementing its policy of economic development. 25 U.S.C. 465 does not differentiate between on and off land or interest in land, but includes all Indian interests which promote the intent of 25 U.S.C. 470. The tax exemptions of 25 U.S.C. 465 apply whether the interest is on Tribal lands or lands on which the Tribe has an interest. In either case, the lands are protected under federal Indian policies for economic development and economic self sufficiency.

The State of New Mexico cannot grant or withhold from an Indian tribe the privilege of doing business, because the field of commerce with Indian tribes is completely removed from the sphere of state power by the Commerce Clause of

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* It should be noted, that the Tribe's economic progress has gone outside the physical boundaries of the Tribe for many years; the Tribe presently has commercial bank accounts in various banks throughout the United States.

the Constitution, which gives the federal government exclusive power over commerce with the Indians no matter where the location of that commerce. The exclusive power of the federal government over commerce with Indians is not limited to Indian Reservations, but extends to any transaction with Indians. A tax laid directly upon the conduct of business by an Indian tribe is clearly contrary to federal authority, of federal Indian policy and a direct impairment of commerce with Indian tribes. The Treaty, with its concern for protecting the Indians, and the Commerce Clause control the commercial intercourse of the Tribes, with this directive implemented by federal legislation and regulations, all to the exclusion of the state.

3. The decision below misapplies the Enabling Act, June 21, 1910, 36 Statutes at Large 557, Ch. 310 Sec. 2, Cl. 2, as it strips away all tax shelters from the Tribe and makes them servient to the state government; the decision further places sovereign Indian tribes in the same category as individual Indians. The New Mexico Enabling Act is similar to Enabling Act provisions in several other western states. (See Idaho Constitution (1890, Art. 21, Sec. 19), Wyoming Constitution (1890, Art. 21, Sec. 26), Utah Constitution (28 Stat. 107, 108).) *United States v. Rickert*, 188 U.S. 432, 28 S. Ct. 478, 47 L.Ed. 532 (1903), interpreted the South Dakota Enabling Act when the State of South Dakota attempted to tax personal property interests of Indians; this act is similar to the New Mexico Enabling Act. The decision of the New Mexico Court of Appeals does not take into consideration *Rickert* and cases referring to the New Mexico Enabling Act.

In *United States v. Sandoval*, 231 U.S. 28, 34 S. Ct. 1, 58 L.Ed. 107 (1913), and *United States v. Chavez*, 290 U.S. 357, 54 S. Ct. 217, 78 L.Ed. 362, 365 (1933), the New Mexico Enabling Act was interpreted by this Court. Those cases declared that the New Mexico Enabling Act reiterates federal control over the Indian Tribes. The Enabling Act serves as a further limitation on the State of New Mexico in its relationship with sovereign Indian Tribes, a fact which has been misapplied by the New Mexico Court of Appeals.

As indicated above, the construction placed upon this provision by the Court of Appeals, indicates that the Enabling Act is a direct federal grant of power to New Mexico to tax Indian tribes when they have property or income off the Reservation; this language is certainly contrary to the language of the provision which distinguishes between individual Indians and tribes, and is clearly contrary to congressional intent expressed in that clause. Interpreted in the light of General Allotment Act policies existing at the time of the passage of the Enabling Act, it is clear that the provision relates solely to individual Indians, and is not a waiver by the United States of Indian tribal immunity from taxation.

4. The Decision of the New Mexico Court of Appeals interferes with Petitioner's right to self-government. The taxes in this case are assessed directly against the Indian Tribe. The taxes allowed by the Court of Appeals below are contrary to federal policies in that they have the effect of restricting Indian tribal choices of business ventures, with a further limitation as to the location of these ventures. Such a restriction thwarts self-government decisions by the Tribe and limits revenue raising projects of the Tribe, all to the detriment of Tribal members. State law may not be applied where it interferes with the Tribe's right to self-government. *Organized Village v. Egan*, 369 U.S. 60, 67-68, 82 S. Ct. 562, 7 L.Ed. 2d 573 (1962). Under the Treaty and under the Tribe's own Constitution, it is an independent, viable community in which the laws of the state have no force and effect. *Williams v. Lee*, 358 U.S. 217, 219, 79 S. Ct. 269, 3 L.Ed. 2d 251 (1959). *Williams* not only states that State law may not be applied where it interferes with the Tribe's right to self-government, but also lays down a very narrow area in which tribal relationships were considered not to be jeopardized by state action. See U.S. 217, 220-221, L.Ed. 2d 251, 253-254. The present case does not fall within these narrow exceptions. In fact, no greater threat to self-government can be imagined than the allowance of one sovereign to tax another. The power to tax is the power to destroy rationale of *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427, 4 L.Ed. 579, (1819), has been applied to Indian Tribes in *United States v. Rickert*, 188 U.S. 432, 438,

23 S. Ct. 478, 47 L.Ed. 532, 536 (1903).

5. The decision below allows taxation of a federal instrumentality, contrary to *United States v. Rickert*, Supra. Rickert indicates that taxing of Indian lands is a tax on an instrumentality employed by the federal government for the benefit and control of the Indian Tribe. The holding in Rickert gains importance in light of the language of 25 U.S.C. 470 ". . . for the purpose of promoting the economic development of the Tribes . . .". 25 U.S.C. 470 sets up a means, or agency, by which the government assists the Indian Tribes, and the States have been disallowed any tax prerogative over such an instrumentality promoting the economic development by 25 U.S.C. 465.

The services performed by the Petitioner as an instrumentality of the federal government are essential. These same needs would be present whether the federal government or the Tribe was bearing this responsibility. Over the years the federal government has used various instrumentalities to meet its obligation of economic protection of the Indians.

This relationship between Congress and the Petitioner for economic development goes back to the terms of the Treaty itself, which establishes responsibility on the part of the federal government to protect and promote the Tribe's development. Under this protection the Tribe becomes a conduit, or instrumentality, in meeting the federal government's obligation.

25 U.S.C. 470 establishes a revolving loan fund in which the loans are repaid to the fund itself. If these funds are taxed, this creates a reduction in repayment and therefore places a burden on the federal government in implementing the purposes of the fund. Such a direct cause and affect relationship due to state taxation on the effort of the federal government to meet the requirements of 25 U.S.C. 470, further indicates that the Petitioner is a federal instrumentality, as a tax on the Petitioner will tax the efforts of the federal government.

This recurring tax will also decrease the amount of money which the Mescalero Apache Tribe will be able to apply toward advancing the social welfare and education of its

members over a thirty year period in which $450,000.00 would be going to the State of New Mexico. Ironically, this money would not be returning to the Tribe in the form of educational benefits as the federal government presently meets the cost of educating the Indian tribes. 25 C.F. R. pt. 33. Such a tax result would create a direct burden upon the federal government.

The Congress could have established this fund directly under the Department of the Interior, but they chose to place these funds directly in the hands of the Tribes, under the control of the Department of the Interior. Whether by Department control or Tribal control the funds of 25 U.S.C. 470 are performing a federal function and are utilized by a federal instrumentality, and the State of New Mexico cannot tax this instrumentality.

6. The tax imposed by the State of New Mexico interferes with existing federal regulations and statutes which have pre-empted the field. As indicated in 25 U.S.C. 465 and 25 U.S.C. 470, Congress has taken very positive steps to remove any vestiges of state control over Indian economic efforts. In the present case it is obvious from the statute creating the economic fund, through regulations implementing the use of these funds, and through controls as indicated in the Stipulation of Facts (T. 5-9), that the federal government is vitally interested in the economic well being of the Tribe and intends to regulate and protect its economic growth.

It has been the goal of various acts passed by Congress to aid the Indian in economic development; these have included the establishment of the Bureau of Indian Affairs, the establishment of Reservations and the allotment system. In each case the result has been federal pre-emption of the state. In the present case Congress has changed the device to one of federal funding of economic projects, but has not changed the exempt status of the endeavor.

In *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 85 S. Ct. 1242, 14 L.Ed. 2d 165 (1965), this Court pre-empted the State from controlling the business of Indian traders on Reservations. The amount of legislation concerning regulation of Indian traders is an insignificant portion of the volume of federal legislation pertaining

to Indians. A review of the Stipulation of Facts and the federal statutes and regulations presently involved, indicate far greater federal control here than that imposed on the Indian trader in *Warren Trading Post v. Arizona Tax Commission*, Supra.

Where this much control exists for economic development, the State cannot interfere with that development and is therefore pre-empted.

7. The decision of the Court below transfers the status of Petitioner from a sovereign, dependent Indian Tribe to that of a corporation, contrary to the holding in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832). The Tribe is a federally chartered Indian Tribe under 25 U.S.C. 476, yet the Court of Appeals has continued to label it as a corporation organized under 25 U.S.C. 477. By so labeling the Petitioner, the Court has diluted Tribal sovereignty and jeopardized the Tribe's continuity; such action leaves the Tribe vulnerable to state control, all contrary to the Treaty, the Commerce Clause, the Tribe's Constitution and *Worcester v. Georgia*, Supra. It is through the structure of the federally chartered Indian tribe that the federal government can better effectuate its programs of economic development and assistance, like those outlined in 25 U.S.C. 470.

The term "Chartered Corporation" as applied to a Tribe organized under Section 476, refers to a political subdivision of the federal government. This again implements the Treaty requirements in cases cited establishing the Indians as dependent sovereigns, dependent upon the federal government. The decision of the court below removes the cloak of Indian sovereignty, leaving the Tribe vulnerable to state regulations.

Conclusion

We respectfully submit that the petition for the writ of certiorari should be granted.

Respectfully submitted,
FETTINGER & BURROUGHS

By F. Randolph Burroughs
Counsel for Petitioner

December, 1971

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

THE MESCALERO APACHE TRIBE,

Appellant

v. NO. 635

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, AND THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,

Appellees

DIRECT APPEAL

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OPINION

HENDLEY, Judge.

The Bureau of Revenue (Bureau) imposed a compensating tax on the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises (Tribe) based upon the purchase price of materials used to construct two ski lifts. The Bureau also imposed an emergency school tax on the gross receipts of the operation of the ski resort. The Tribe protested the compensating tax assessment and also filed a claim of refund for the sums paid under the emergency school tax assessment. The Bureau ruled adversely on the Tribe's protest of the compensating tax assessment and the claim of refund of the school taxes. The Tribe appeals directly to this court pursuant to Section 72-13-39, N.M.S.A. 1953 (Supp. 1969).

We affirm.

This appeal is based upon a stipulation of facts entered into by the Tribe and the Bureau, a summary of which is as follows. The Tribe is a treaty tribe, residing on reservation lands situated within the counties of Lincoln and Otero in the State of New Mexico and has adopted a constitution in accordance with governmental regulations. The ski resort is also located in Lincoln and Otero Counties and is on lands belonging to the United States Forest Service under a thirty year lease to the Tribe, except for some of the cross-country ski trails which are on reservation lands. No part of the ski resort buildings or equipment are located within the boundaries of the Tribe's reservation. The basic purpose of the ski resort is to provide revenue which is used for educational, social and economic welfare of the Tribe. The ski resort also provides a job training center for approximately twenty to thirty tribal members. The purchase and construction of the ski resort was totally financed by a loan from the Federal Government pursuant to 25 U.S.C.A. Section 470. The approval of the Bureau of Indian Affairs of the Department of Interior is required for the ski resort budget for each fiscal year, leasing of equipment or other property, leasing facilities to concessionaires, plans and designs for construction of additional facilities or im-

provements, disposal of property other than expendable items, form and contents of monthly interim reports and accounting records and other related areas dealing with the ski resort.

On appeal the Tribe asserts: (1) the State has no authority to tax the Tribe; (2) assuming it has authority to tax the Tribe, the State, in its statutes, has not attempted to tax the Tribe; and (3) the Tribe is exempt from taxation because it is a federal instrumentality.

I. AUTHORITY TO TAX.

The Tribe contends that the State has no authority to tax because: (a) exclusive jurisdiction over the Tribe is vested in the Federal Government; (b) it is inconsistent with the Treaty between the Tribe and the Federal Government; and (c) it interferes with the Tribe's right to self-government.

(a) *Exclusive Jurisdiction.*

It is the Tribe's contention that the Treaty between the Tribe and the United States Government, which became effective March 25, 1883, vests exclusive jurisdiction over the Tribe in the Federal Government. Article I of the Treaty states:

> "Article 1. Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit."

The Tribe further contends that this argument is buttressed by Article I, Section 8 of the United States Constitution which states that the United States Congress shall have power "To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes; ..."

We agree with the Tribe on this general proposition, but we must call attention to the fact that the Tribe submitted to the United States "power and authority." Subsequently, the United States Congress, on June 20, 1910, 36 Statutes

at large 557, ch. 310, enacted the Enabling Act for New Mexico. Section 2, second, after stating that Indian land shall be under the absolute jurisdiction and control of the Congress of the United States, stated in part:

> . . . (B)ut nothing herein, or in the ordinance herein provided for, shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by an Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as congress has prescribed or may hereafter prescribe."

This Enabling Act is a specific grant of power which was later incorporated into Article XXI, Section 2, of the New Mexico Constitution wherein the almost identical language was adopted.

Consequently, by virtue of the Enabling Act the Federal Government permitted the State of New Mexico to tax, ". . . as other lands and other property are taxed, any lands and property outside of an Indian reservation . . . owned or held by any Indian."

The Tribe contends that under Article VI, (Clause 2), of the United States Constitution, when there is a conflict between a Treaty and the provision of a State Constitution or statute, regardless of whether the State constitutional or statutory provision is prior to or subsequent to the making of the Treaty, the Treaty will control. United States v. Belmont, 301 U.S. 324, 57 S. Ct. 758, 81 L.Ed. 1134 (1937). We agree with this general proposition, however, we do not find the Treaty to be in conflict with the provisions of the New Mexico Constitution or any of its statutes when the tax is on lands or properties located off Indian land. The Treaty subjects the Tribe to the laws of the United States, and the Enabling Act permits New Mexico to tax in this situation.

The Tribe contends the lease of the Federal Forest Service lands was an acquisition of land under 25 U.S.C.A. Section 465, which permits the Secretary of Interior to acquire lands within or without existing reservations for the purpose of providing lands for Indians. 25 U.S.C.A. Section 465 provides that title to "any lands or rights acquired" pursuant to 25 U.S.C.A. Section 470 shall be exempt from State taxation. The purchase and construction of the ski resort was financed by a loan under 25 U.S.C.A. Section 470. Assuming the Tribe's leasehold rights and its interest in the ski resort facilities are land, or rights acquired in land, a proposition we do not decide, the exemption from State taxation is also to land, or rights acquired in land. The tax involved here applies neither to land nor to rights acquired in land. The tax under the old "compensating or use tax" is on tangible personal property, see Section 72-17-3, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2) and under the Emergency School Tax Act on the privilege of engaging in business activities within New Mexico. See Section 72-16-4.1, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2); see Edmunds v. Bureau of Revenue, 64 N.M. 454, 330 P. 2d 131 (1958). The exemption under 25 U.S.C.A. Section 465 does not apply in this case.

We have considered the Tribe's other contentions and cited cases, but find them distinguishable on the facts and under the law above cited.

(b) *The Taxation Being Inconsistent with the Treaty.* The Tribe relies upon Articles 9, 10 and 11 of the Treaty when read with Article 1, cited above, for the proposition that the Treaty imposed a duty on the United States Government to pass legislation and do other acts to insure the permanent prosperity and happiness of the Tribe and that the United States Government is duly bound by this Treaty to make donations, gifts and implements to the Tribe. The Tribe contends that it would be inconsistent with those purposes for the State of New Mexico to be allowed to disrupt the scheme of the Federal Government by permitting an imposition of New Mexico taxes on the Tribe.

We fail to see the merit of the argument. In reviewing the other Articles of the Treaty, the apparent purpose of

the Treaty was to insure the Tribe of certain lands and of certain freedoms on tribal lands but it did not include freedom from a situation as disclosed by the facts of this case.

We do not pass judgment on the contention of the Tribe that the Federal Government is interested in the financial success of the Tribe's operation of a ski resort; however, we fail to see, in light of the foregoing Treaty and Enabling Act provisions, how the Federal Government intended to exempt the Tribe from taxation for activities and operations occurring off Indian lands. The Enabling Act itself denies this contention.

(c) *Interference with Tribe's Right to Self-Government.* We agree with the Tribe's contention that if the imposition of a State tax on the Tribe interferes with the Tribe's right to reservation self-government the tax must fail. Ghahate v. Bureau of Revenue, 80 N.M. 98, 451 P. 2d 1002 (Ct. App. 1969). The Tribe claims such interference in this case even though the taxes involved arose from and because of operations conducted by the Tribe on non-Indian land. The claim is based on the fact that revenue derived from the ski resort operation is used for the welfare of the Tribe and the resort provides job training for members of the Tribe. These facts show no interference with reservation self-government. The Tribe contends, however, that it *might* interfere because the power to tax is the power to destroy and: "The purpose for which the appellant entered into the ski resort operation is being frustrated and possibly could even be totally defeated if New Mexico is allowed to tax the operation." There are no facts showing a present frustrated purpose; the remainder of the argument is no more than speculation. There being no factual basis for the claim, it is rejected. Compare Village of Kake v. Egan, 369 U.S. 60, 80 S. Ct. 562, 7 L.Ed. 2d 573 (1962); McClanahan v. State Tax Commission, ____ Ariz. App. ____, 484 P. 2d 221 (1971).

2. AUTHORITY TO TAX THE TRIBE WHICH THE STATE HAS NOT ATTEMPTED TO TAX.

It is the Tribe's contention here that since it is not specifically named in Section 72-17-2 (e), N.M.S.A. 1953

(Repl. Vol. 1961) of the Compensating Tax Act, and Section 72-16-3 (A), N.M.S.A. 1953 (Repl. Vol. 1961) of the Emergency School Tax Act (both repealed July 1, 1967, and both taxes were for periods of time prior to the repeal), that they are excluded on the basis that general acts do not apply to State statutory authority to tax the Tribe. See Chouteau v. Commissioner of Internal Revenue, 38 F. 2d (1930); compare Southern Union Gas Company v. New Mexico Public Service Commission ____N.M.____, 482 P. 2d 913 (1971).

No claim is made that the Tribe does not come within the definition of "person" in Sections 72-17-2 (e) and 72-16-2 (A), supra. The claim is simply that to be taxable, the Tribe must have been specifically named. We disagree. Whatever may be the current validity of the concept that Indians could not be taxed unless specifically named, the Enabling Act specifically permitted the taxation "as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian. . . ." With this specific federal legislative permission, we see no basis in reason, in New Mexico, for the concept that Indians must be specifically named to be included within a statute of general application. The Enabling Act states that Indian property, in the situation in this case, is to be taxed as other property is taxed.

3. TRIBE EXEMPT FROM TAXATION BECAUSE IT IS A FEDERAL INSTRUMENTALITY.

It is the Tribe's contention here that even assuming New Mexico does have authority to tax the Tribe, and assuming further that the Tribe comes within the definition of "person" in the taxing statutes, the Tribe is exempt because it is a federal instrumentality.

The Tribe cites the *Handbook on Federal Indian Law*, U. S. Printing Office (1958) at page 853, for the proposition that insofar as the instrumentality doctrine is concerned, it relates to Indians, their property and their affairs. We do not agree with the Tribe on this general proposition. The Tribe's argument is based on the fact that it is a Tribe and its ski resort operation is financed and supervised by

the Federal Government. These facts, in our opinion, are insufficient to support a conclusion that the ski resort is virtually an arm of the United States Government, see dissenting opinion of Justice Marshall in Agricultural Nat. Bank v. Tax Commission, 392 U.S. 339, 80 S. Ct. 2173, 20 L. Ed. 2d 1133 (1963), and cases cited therein; certainly the ski resort is not essential for the performance of governmental functions, but, even if the ski resort could be considered a federal instrumentality, the immunity of the resort from taxation is removed by the provisions of our Enabling Act previously discussed in this opinion.

Affirmed.

IT IS SO ORDERED.

s/ William R. Hendley
JUDGE

I CONCUR:

s/ Joe W. Wood, C. J.
Lewis R. Sutin, J. (specially concurring)

SUTIN, Judge (Specially concurring)

I specially concur only because the Mescalero Apache Tribe or Sierra Blanca Ski Enterprises, I.D. No. 14-703019-00, which owns the ski resort, is a federal Indian chartered "corporation," pursuant to 25 U.S.C.A., Sections 477 and 470.

The fact of being a chartered corporation does not appear in the stipulation. Nevertheless, it states:

* * * *

7. The purchase and construction of the ski resort was financed completely by a loan to the Tribe by the federal government under 25 U.S.C.A., Section 470.

25 U.S.C.A., Section 470 provides that the Secretary of the Interior ". . . may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, . . ."

25 U.S.C.A., Section 477 provides that the Secretary of the Interior may issue a charter of incorporation to a tribe. It further provides:

such charter may convey to the *Incorporated tribe* the power to purchase . . ., or otherwise own, hold, manage, operate, and dispose of property of *every* description, real and personal, . . . *and such further powers as may be incidental to the conduct of corporate business*, not inconsistent with law, ... Any charter so issued shall not be revoked or surrendered except by Act of Congress. (Emphasis added.)

Article XI, Section 1 (a) of the Tribe's Revised Constitution is a part of the stipulation. It provides that the Mescalero Apache Tribal Council has the duty and power to transfer tribal property and other assets to tribal corporations.

The Mescalero Apache Tribe states in its reply brief:

> The issue of a federally chartered corporation under Section 477 is not present in this case.

To me, this constitutes an admission that the Tribe, or Sierra Blanca Ski Enterprises is an Indian chartered corporation. This corporation should be taxed.

The Notice of Assessment of Taxes by the Commissioner was made to Sierra Blanca Ski Enterprise, not to the Tribe. The title of the Protest of Assessment filed by the Tribe refers to Sierra Blanca Ski Enterprises. The Tribe stated it was the "owner and operator of Sierra Blanca Ski Enterprises." In the title to the stipulation of the facts and the decision and order of the Commissioner, it is described as "Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises, I.D. No. 14-703019-00." The Tribe was taxed in this name because probably it led the Commissioner to believe it was not a chartered corporation.

If the assumptions of corporate life in this specially concurring opinion are wrong, and called to the attention of this court on motion for rehearing, I will dissent. I do not agree that an Indian Tribe is subject to payment of the state compensating tax or school tax assessments.

This appears to be the first state tax case against an Indian chartered corporation or tribe. Let us take a look at the history of corporate Indian tribes.

Cohen's Handbook of Federal Indian Law, p. 277, states:

> In the narrow sense in which the term is frequently used, a corporation is something chart-

ared by a government, and in this sense only those Indian tribes which have been chartered by some government, e.g., the Pueblos of New Mexico incorporated by territorial legislation, and the tribes incorporated under section 17 of the Act of June 18, 1934, (25 U.S.C.A., Section 477) are to be considered corporations.

See United States v. Lucero, 1 N.M. 422, 438 (1869).

In Cohen's, supra, p. 278, 279, the author says:

> Thus it has been administratively determined that the Pueblos of New Mexico are entitled to receive grazing privileges under the Taylor Grazing Act, under the clause in section 3 of that act conferring such rights upon "corporations authorized to conduct business under the laws of the State." The principle involved would appear to be equally applicable to any Indian tribe which has a recognized corporate status, either under the Act of June 18, 1934, or otherwise.

See also Cohen's, supra, p. 509, wherein it is said:

> The corporate status of the Pueblos has been recognized in many cases.

The corporate status of Pueblo Indian communities, created in 1847, is still alive in New Mexico. Section 51-17-1, N.M.S.A. 1953 (Repl. Vol. 8, pt. 1). This section gave the Indian Pueblos the status of bodies politic and corporate, and, as such, empowered them to sue in respect of their lands. Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 63 L.Ed. 504, 39 S. Ct. 185 (1918); Garcia v. United States, 43 F. 2d 873 (10th Cir. 1930).

In 1904, the Supreme Court of New Mexico held taxable the lands of the Pueblo Indians in New Mexico. Territory v. Delinquent Taxpayers, 12 N.M. 139, 76 P. 307 (1904).

The Tribe claims 28 U.S.C.A., Section 465 is a restraint on state's activities. This section applies to title to lands taken in the name of the United States in trust for the Indian tribe or individual Indian. Such lands are exempt from state and local taxation. Chartered Indian corporations are not covered by this section. But see, Martines v. Southern Ute Tribe, 150 Colo. 504, 374 P. 2d 691 (1962).

Under the state taxing acts, a "person" includes a corporation. They do not exclude Indian chartered corporations. Neither is the Indian chartered corporation exempt from payment of taxes. If it were intended to be an instrumentality of the United States, it would have been so stated in 25 U.S.C.A., Section 477.

It might be noted that Section 72-13-79, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, Supp. 1969), of the Tax Administration Act, adopted in 1965, provides:

> Liens will attach or levy may be made by terms of any provision of the Tax Administration Act . . . to or on property belonging to the United States of America or to an Indian tribe, an Indian pueblo or any Indian only to the extent allowed by law.

Here again, the Indian chartered corporation is omitted.

Some states "have been given jurisdiction by federal statute over the reservations within their borders. The tribes within these states no longer exercise governmental functions independent of the state. Morever, Congress has authorized all states to extend jurisdiction over tribes within their borders by official act" with tribal consent. 25 U.S.C.A., Sections 1321-22 (Supp. 1970); 82 Harvard Law Review 1343. New Mexico has not moved toward assumption of jurisdiction.

The Mescalero Apache Tribe has left the confines of its reservation. It has donned the robes of a corporation to join its competitors in business. It stood high in its tradition as a separate "nation." It now stands strong in its business and cultural development. As it earns from citizens of this country, it should carry the same burdens of taxation as its competitors. It may even continue in additional ventures in business in every phase of corporate life. New Mexico should welcome this adventure as much as it has welcomed others to come in the last 123 years.

In my opinion, an Indian chartered corporation operating on non-Indian land is subject to the compensating tax and school tax of this state.

For these reasons, I specially concur.

s/ Lewis R. Sutin
Judge

Under the plain language such a "reservation" included a corporation. They do not exclude Indian chartered corporations. Neither is the Indian chartered corporation exempt from payment of taxes. It is not intended to be an instrumentality of the United States. It would have been so stated in 25 U.S.C. Section 477.

It might be noted that Section 16 of the I.R.A. 1953 (Pub. Vol. 19, pt. 2, supp. 1954), or the Tax Administration Act, adopted in such pertinent:

> Lien with liters or levy may be made by terms of any provision of the Tax Administration Act or of any property belonging to the United States or to an Indian tribe, or in any manner subject to any trust or restriction imposed by law.

Here again the Indian chartered corporation is omitted.

Some states have been given jurisdiction by federal statute over the reservations within their borders. The tribes within these states possess exclusive governmental sovereign independent of the state. However, Congress has conferred jurisdiction over Indian over Indian with in their borders by official act with tribal consent. 25 U.S.C. Sections 1321-22 (Supp. 1956) "Civil Law Review 1954 New Mexico has passed towards assumption of jurisdiction. Thus has for the whole of its reservation. Has created the notion of a corporation to take its obligations in business. It need high in its rights in the corporation. It is also partially strong in its business and Colonial domain. The it work from the area of this country, it should carry the same burden of taxation as the conditions. It may also continuation adjustment ventures in business in many ways of economic life. Economical welcome this adventure as much as it has welcomed others in some [illegible] 155 [illegible]

In our opinion, as Indian chartered corporation corporation on reservation land is subject to the corporation tax and taxes of this state. Establishment to other radical [illegible] resources. Agricultural communities are state more [illegible]

[illegible]

Appendix B

FRANKLIN PIERCE,

PRESIDENT OF THE UNITED STATES OF AMERICA:

July 1, 1852.

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME GREETING:

Preamble.

WHEREAS a Treaty was made and concluded at Santa Fé, New Mexico, on the first day of July, in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E. V. Sumner, U. S. A., commanding the 9th Department, and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Captain Simon, Captain Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache nation of Indians, situate and living within the limits of the United States, which treaty is in the words following, to wit:

Articles of a Treaty made and entered into at Santa Fé, New Mexico, on the first day of July in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E. V. Sumner, U. S. A., commanding the 9 Department and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache Nation of Indians, situate and living within the limits of the United States.

ARTICLE 1. Said nation or tribe of Indians through their authorised Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit.

Authority of United States acknowledged.

Peace to exist.

ARTICLE 2. From and after the signing of this Treaty hostilities between the contracting parties shall forever cease, and perpetual peace and amity shall forever exist between said Indians and the government and people of the United States; the said nation, or tribe of Indians, hereby binding themselves most solemnly never to associate with or give countenance or aid to any tribe or band of Indians, or other persons or powers, who may be at any time at war or enmity with the government or people of said United States.

The Apaches not to assist other tribes in hostilities.

Good treatment of citizens of the United States by nations at peace with them.

ARTICLE 3. Said nation, or tribe of Indians, do hereby bind themselves for all future time to treat honestly and humanely all citizens of the United States, with whom they may have intercourse, as well as all persons and powers at peace with the said United States, who may be lawfully among them, or with whom they may have any lawful intercourse.

Cases of aggression on them to be referred to government. Laws to be conformed to.

ARTICLE 4. All said nation or tribe of Indians, hereby bind themselves to refer all cases of aggression against themselves or their property and territory, to the government of the United states for adjustment, and to conform in all things to the laws, rules, and regulations of said government in regard to the Indian tribes.

Provisions against incursions into Mexico.

ARTICLE 5. Said nation, or tribe of Indians, do hereby bind themselves for all future time to desist and refrain from making any "incursions within the Territory of Mexico" of a hostile or predatory character; and that they will for the future refrain from taking and conveying into captivity any of the people or citizens of Mexico, or the animals or property of the people or government of Mexico; and that they will, as soon as possible after the signing of this treaty, surrender to their agent all captives now in their possession.

Persons injuring the Apaches to be tried and punished.

ARTICLE 6. Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Apache Indian or Indians, he or they shall be arrested and tried, and upon conviction, shall be subject to all the penalties provided by law for the protection of the persons and property of the people of the said States.

Free passage over the Apache territory.

ARTICLE 7. The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

Military posts, agencies, and trading house to be established.

ARTICLE 8. In order to preserve tranquility and to afford protection to all the people and interests of the contracting parties, the government of the United States of America will establish such military posts and agencies, and authorize such trading houses at such times and places as the said government may designate.

Territorial boundaries to be adjusted.

ARTICLE 9. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apache's that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

Presents to the Apaches.

ARTICLE 10. For and in consideration of the faithful performance of all the stipulations herein contained, by the said Apache's Indians, the government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures as said government may deem meet and proper.

When treaty to be binding.

ARTICLE 11. This Treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the government of the United States; and, finally, this treaty is to receive a liberal construction at all times and in all places, to the end that the said Apache Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.

How construed.

In faith whereof we the undersigned have signed this Treaty, and affixed thereunto our seals, at the City of Santa Fé, this the first day of July in the year of our Lord one thousand eight hundred and fifty-two.

WITNESSES:

F. A. CUNNINGHAM,
Paymaster, U.S.A.
J. C. McFERRAN,
1st Lt. 3d Inf. Act. Ast. Adj. Gen.
CALEB SHERMAN.
FRED SAYNTON.
CHAS. McDONALD,
Surgeon, U.S.A.
E. M. BAIRD,
Witness to the signing of Mangus Colorado.
JOHN POPE,
Brvt. Capt. T. E.

E. V. SUMNER, (Seal.)
Bvt. Col. U. S. A. com'g 9th Dept. In charge of Executive Office of New Mexico.

JOHN GREINER, (Seal.)
Act. Supt. Indian Affairs, New Mexico.
CAPITAN VUMBA, his x mark (Seal.)
CUMPITAS ANTONE, his x mark (Seal.)
BLANCIEO _____, his x mark (Seal.)
WEMITO _____, his x mark (Seal.)
CAPITAN SIMON, his x mark (Seal.)
MANGUS COLORADO, his x mark (Seal.)

AND WHEREAS the said Treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the twenty-third day of March, one thousand eight hundred and fifty-three, advise and consent to the ratification of its articles, by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES, March 23d, 1853.

Resolved, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the Articles of a Treaty made and entered into at Santa Fe, New Mexico, on the first day of July, in the year of our Lord, 1852, by and between Colonel E. V. Sumner, United States Army, commanding the 9th Department, and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said

Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache nation of Indians, situate and living within the limits of the United States.

Attest— ASBURY DICKINS, *Secretary*.

Now, therefore, be it known, that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the twenty-third day of March, one thousand eight hundred and fifty-three, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be herewith affixed, having signed the same with my hand.

Done at the city of Washington, this twenty-fifth day of March, in the year of our Lord one thousand eight hundred and
(L.S.) fifty-three, and of the Independence of the United States the seventy-seventh.

FRANKLIN PIERCE.

BY THE PRESIDENT:

W. L. MARCY, *Secretary of State*.

Appendix C

1. 25 U.S.C. Section 476: "Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under the rules and regulations as he may prescribe. Such constitution and by-laws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and by-laws may be ratified and approved by the Secretary in the same manner as the original constitution and by-laws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

2. Partial Table of Contents, 25 C.F.R. pt. 91: (This regulation is too long to reproduce; for reference to particular sections, a portion of its Table of Contents follows:)

"Part 91 — General Credit to Indians

Sec.

91.1 Purpose.

91.2 Eligible borrowers.

91. 3 Application.

91. 4 Purpose of loans.

91. 5 Approval of loans.

91. 6 Interest.

91. 7 Records and reports.

91. 8 Maturity.

91. 9 Security.

91.10 Penalties on default.

91.11 Assignment.

91.12 Tribal funds.

91.13 Relending by borrower.

91.14 Repayments.

91.15 Charters.

91.16 Educational loans.

91.17 Amendments to articles of association and by-laws.

91.18 Loans to Navajo and Hopi Indians.

91.19 Loans to encourage industry.

91.21 Loans for expert assistance."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

MOTION FILED

No. 71-738

DEC 23 1971

THE MESCALERO APACHE TRIBE,

Petitioner,

v.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE, AND BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., THE HUALAPAI TRIBE, THE LAGUNA PUEBLO, THE METLAKATLA INDIAN COMMUNITY, THE NAVAJO TRIBE, THE NEZ PERCE TRIBE, THE SAN CARLOS APACHE TRIBE, THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, AND THE SENECA NATION, as AMICI CURIAE, IN SUPPORT OF PETITION FOR CERTIORARI

ARTHUR LAZARUS, JR.
600 New Hampshire Avenue, N. W.
Washington, D. C. 20037

Attorney for Amici Curiae

Of Counsel:

PHILIP R. ASHBY
ROYAL D. MARKS
ROBERT C. STROM
GEORGE P. VLASSIS
FRANCIS J. O'TOOLE

TABLE OF CITATIONS FOR BRIEF

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-738

THE MESCALERO APACHE TRIBE,

Petitioner,

v.

FRANKLIN JONES, Commissioner Of The Bureau Of Revenue Of The State Of New Mexico, and THE BUREAU OF REVENUE Of The State Of New Mexico,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The Association on American Indian Affairs, Inc., the Hualapai Tribe of Arizona, the Laguna Pueblo of New Mexico, the Metlakatla Indian Community of Alaska, the Navajo Tribe of Arizona and New Mexico, the Nez Perce Tribe of Idaho, the San Carlos Apache Tribe of Arizona, the Salt River Pima-Maricopa Indian Community of Arizona, and the Seneca Nation of Indians in New York respectfully move the Court pursuant to Rule 42(3) for leave to file the attached brief *amici curiae* in support of the petition for certiorari in the above-captioned cased. Petitioner, the Mescalero Apache Tribe, has consented to the filing of this brief; respondents have refused so to consent.

The Association on American Indian Affairs, is a non-profit membership corporation, organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The largest Indian-interest organization in the country, the Association's membership of 50,000 is made up of both Indians and non-Indians, and is nationwide in scope. Over the years, the Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of *amicus curiae* briefs with this Court in *Puyallup Tribe v. Department of Game of the State of Washington*, 391 U.S. 392 (1968), in *Warren Trading Post Company v. Arizona State Tax Comm.*, 380 U.S. 685 (1965), and most recently in *Affiliated Ute Citizens of the State of Utah, et al. v. United States, et al.*, No. 1331, October Term, 1970, and *Agua Caliente Band of Mission Indians, et al. v. County of Riverside*, No. 71-83, October Term, 1971.

The Hualapai Tribe, the Laguna Pueblo, the Metlakatla Indian Community, the Navajo Tribe, the Nez Perce Tribe, the San Carlos Apache Tribe, and the Salt River Pima-Maricopa Indian Community are recognized tribes of American Indians which exercise jurisdiction over, and are the beneficial owners of, seven reservations held in trust by the United States.* The Navajo Tribe, with a population in excess of 120,000, is the largest Indian tribe in the country. All of these tribes are affected by the same legal, social and economic problems which face the Mescalero Apache Tribe, and all are seeking with equal vigor to raise the standard of living of their members through local commercial enterprises and resource development.

This case presents a question of great and continuing concern to the Association and to Indians generally—the question of whether a state may impose its taxes and thus its

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*The Seneca Nation, also a recognized tribe, holds title to its three reservations pursuant to federal treaty and statute, and subject to a restriction upon alienation.

law upon activities engaged in by an Indian tribe, with the direct assistance of the federal government, for the social and economic benefits of its members. The parties hereto, of course, are concerned with this issue in only a limited context: *i.e.*, whether particular New Mexico taxes, levied upon particular Mescalero Apache property and functions, validly were collected. The Association and the tribes which have joined in this motion, on the other hand, are interested in demonstrating to the Court that proper resolution of the question here presented will have broad and ever-increasing national significance as Indians throughout the United States undertake tourist, recreational and business operations in accordance with federally-sponsored self-help programs.

Specifically, the Association and the moving tribes are submitting the attached brief in order to assist the Court in recognizing that the judgment of the Court of Appeals for the State of New Mexico in this case: (1) runs counter to precedents dating back to the earliest days of this nation in which the quasi-sovereign powers of Indian tribes have been respected and enforced; (2) represents yet another manifestation of the continuing effort by state governments, in their search for additional sources of revenue, to whittle away traditional Indian tax exemptions; and (3) if not reversed, will lay the foundation for imposition upon Indian tribes of new state tax burdens of sufficient magnitude to frustrate economic development projects in which the tribes are engaged, or hope to engage, with federal encouragement and support.

Since the foregoing points cover important facets of the decision below which the immediate parties are not likely to

discuss, the Association and the named Indian tribes joining herein request that their motion for leave to file the attached brief as *amici curiae* be granted.

Respectfully submitted,

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Francis J. O'Toole

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-738

THE MESCALERO APACHE TRIBE,

Petitioner,

v.

FRANKLIN JONES, Commissioner Of The Bureau Of Revenue Of The State Of New Mexico, and THE BUREAU OF REVENUE Of The State Of New Mexico,

Respondents.

BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., THE HUALAPAI TRIBE, THE LAGUNA PUEBLO, THE METLAKATLA INDIAN COMMUNITY, THE NAVAJO TRIBE, THE NEZ PERCE TRIBE, THE SAN CARLOS APACHE TRIBE, THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, AND THE SENECA NATION, as AMICI CURIAE, IN SUPPORT OF PETITION OF CERTIORARI

INTEREST OF AMICI CURIAE

The interest of the Association on American Indian Affairs, Inc., the Hualapai Tribe of Arizona, the Laguna Pueblo of New Mexico, the Metlakatla Indian Community of Alaska, the Navajo Tribe of Arizona and New Mexico, the Nez Perce Tribe of Idaho, the San Carlos Apache Tribe of Arizona, the Salt River Pima-Maricopa Indian Community of Arizona, and the Seneca Nation of Indians of New York in the question presented by the case at bar is fully set

forth in the attached motion for leave to file this brief as *amici curiae*, and is not here repeated. Stated in summary, the Association and the named Indian tribes are concerned: first, that the sovereign powers of the Mescalero Apache Tribe and, through it, of all recognized tribes of American Indians under the Constitution, laws and treaties of the United States be identified and protected; and second, that the long-standing governmental policy, reflected in countless past precedents, of insulating Indian tribes from state taxation not be infringed, particularly in connection with tribal activities undertaken with federal assistance for the social and economic betterment of tribal members. Finally, *amici curiae* are concerned that, if New Mexico and other states are permitted to levy taxes upon tribal enterprises, both the implementation of Indian self-determination and the achievement of Indian resource development will be seriously impaired.

REASONS FOR GRANTING THE WRIT

Three levels of government continuously compete for the right to regulate Indians, Indian tribes and Indian affairs: the United States, the several states, and the tribes themselves. In the case at bar, these often-conflicting governmental interests are presented in the context of Indian economic development. First, there is the interest of the federal government in supporting the self-help efforts of Indian tribes to achieve financial stability. Second, there is the interest of a state in raising tax revenues from an Indian economic activity as a means to effectuate general state purposes. See also *Agua Caliente Band of Mission Indians, et al. v. County of Riverside*, No. 71-83, October Term, 1971. Third, there is the interest of an Indian tribe in pursuing an available course of economic development which not only will raise the standard of living of tribal members, but also, in fiscal terms, will give meaning to its powers of self-government. Thus, in the instant case, federal and tribal interests are in harmony, while the state interest constitutes a direct challenge to both.

Recently, this Court in *Warren Trading Post v. Arizona Tax Comm.*, 380 U.S. 685 (1965), and *Williams v. Lee*, 358 U.S. 217 (1959), reaffirmed two signal principles of Indian law covering federal-state-tribal relationships. In *Warren*, the Court held, in a unanimous opinion, that state action is impermissible where it would interfere with a federal policy concerning Indian affairs. In *Williams*, a unanimous Court held that state action is impermissible where it would infringe upon a tribal right of local self-government.

Warren, supra, involved the expression through licensing statutes of a federal interest in the regulation of non-Indian traders on the Navajo Reservation. This expression of federal concern was sufficient, the Court ruled, to prevent the state from asserting its interest in Indian trading by taxing the gross income of the non-Indian trader. The Court in *Warren* did not find any express federal prohibition of state taxation of traders, and left open the manner in which, and degree to which, beyond a direct prohibition, the federal interest in a particular aspect of Indian affairs must be shown to render state taxation impermissible. This case seeks an amplification of the *Warren* holding.

Williams, supra, involved the attempt of a non-Indian to invoke the civil jurisdiction of a state court over a transaction with an Indian which had occurred on an Indian reservation. The Court there felt that the involvement of a non-Indian was not sufficient to defeat application of tribal legal procedures, and held the state action impermissible even where it interfered only to a minor degree with the exercise of tribal self-government powers on the reservation. The Court, of course, did not decide whether state action which interferes to a major degree with the performance of tribal functions outside reservation boundaries is permissible, and this case also presents that issue.

The questions in this case do not involve whether the federal government has the legal right to prevent application of state laws with respect to Indian economic development.

The federal government's paramount power over Indians and Indian affairs is founded upon the Constitution [U.S. CONST. Art I, §8, cl. 3; Art. II, §2, cl. 2; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 350, 379 (1832)]; upon the fiduciary relationship between the federal government and Indian tribes [*United States v. Kagama*, 118 U.S. 375, 383 (1886)]; and upon the nature of the federal government's relationship to Indian land. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 240, 259, 261 (1823).

Nor does this case involve the territorial scope of the federal government's paramount power. Since the federal power finds its source not only in the trust relationship of the federal government to Indian land, but also in the Constitution and treaties of the United States, this Court long has recognized that the exercise of the power is not restricted to property or activities within the boundaries of a reservation. *Warren, supra*, at 692, n. 18; *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 417-18 (1866).

Rather, the questions presented here are whether there is an interest of the federal government in Indian economic development sufficient to preclude implementation of a particular state interest in the same subject, and whether the territorial scope of an Indian tribe's self-governmental powers is limited absolutely to tribal activity within the boundaries of a reservation. The decisions of the Court on related questions support the proposition, here pressed by the Petitioner, and endorsed by *amici curiae*, that the interest of the State of New Mexico in taxing Indian economic development must give way to the interests of the federal government and of the tribe in fostering such activity, even where the enterprise lies outside reservation land.

In a landmark 1819 decision, which did not involve federal power over Indian affairs, the Court first fashioned the Supremacy Clause [U.S. CONST. Art. VI, cl. 2] principle that the states have no power, by taxation or otherwise, to retard, impede, or burden the means used by the federal government to carry out powers committed to that government by the Constitution. *McCulloch v. Maryland*, 17 U.S.

(4 Wheat.) 316, 436 (1819). While the Court has restricted the decision in McCulloch over the intervening century and one-half [see, *e.g.*, *United States v. Detroit*, 355 U.S. 466 (1958)], it has never retreated from the principle that

> "... the authority of state laws or their administration may not interfere with the carrying out of a national purpose. Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way."

Stewart v. Sadrakula, 309 U.S. 94, 103-4 (1939).

This Court applied the principle fashioned in *McCulloch* to the power of the federal government over Indian affairs in *United States v. Rickert*, 188 U.S. 432 (1902. The question in *Rickert* was whether a county of the State of South Dakota could tax improvements and personal property of individual Indians. No direct federal prohibition of such state action existed, nor was there any comprehensive federal scheme of regulation with respect to personal property and improvements such as the scheme of trader regulation involved in *Warren, supra.* Nonetheless, the Court found that local taxation of Indian personal property was impermissible since it might frustrate the federal purpose to improve the economic lot of the Indian allottee. 188 U.S. at 443.

There is today a clear national policy being pursued by the federal government to improve the economic status of Indian tribes through federally assisted self-help. A key mechanism for carrying out that national policy is the revolving loan fund [25 U.S.C. §470], a major source of capital used by the Mescalero Apache Tribe to finance the ski resort involved in this case. Furthermore, the executive branch of the government enjoys a broad Congressional delegation of authority in the management of Indian affairs [25 U.S.C. §2], and the President has issued a mandate to the Administration actively to support with money and other resources the economic development of Indian tribes. *Indian*

Affairs, The President's Message to the Congress, 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 894, 900-01 (1970). These expressions of federal interest in Indian economic development, and the employment of federal resources by the Mescalero Apache Tribe in establishing its off-reservation commercial enterprise, dictate that the tax powers of the State of New Mexico must give way.*

Application of the state revenue laws to Petitioner's activities also would infringe upon the sovereign rights of the Mescalero Apache Tribe. *Williams, supra*, reaffirmed the principle of tribal self-government first fashioned by the Court in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and later characterized by the Court as an inherent right of the tribes in *Talton v. Mayes*, 163 U.S. 376 (1896). The court below found no impairment of the right of tribal self-government through imposition of a state tax, since it felt that this right is one which exists only within the confines of reservation boundaries. The New Mexico Court thus overlooked the principle that Indian tribes are in some senses sovereign [*Worcester v. Georgia, supra*] and in some senses federal instrumentalities [*United States v. Rickert, supra*], and in both senses should be immune from state taxation regardless of the locus of their operations. See *Territory of Alaska v. Annette Island Packing Co.*, 289 F. 671 (9th Cir. 1923), *cert. den.* 263 U.S. 708 (1923). The court below further paid no heed to the fact that the power to tax is the power to destroy [*McCulloch v. Maryland, supra*], and that the potential for state appropriation of tribal property used in economic development activities involves the same infringement upon the functions of Indian self-government no matter where the tribal property is located.

**Cf. Squire v. Capoeman*, 351 U.S. 1 (1956), in which the Court found that the federal policy of protecting Indian land was sufficiently strong to defeat a competing federal revenue interest.

CONCLUSION

Indians occupy a unique, but in some respects unenviable, status in American society. They were the first Americans, but they are the poorest of poor Americans. They remain, after over 200 years in this society, in dire need of education, jobs, housing, health care and other services and opportunities which most Americans take for granted. Economic deprivation is the most serious of Indian problems. Recognizing that "it is critically important that the Federal government support and encourage efforts which help Indians develop their own economic infrastructure", President Nixon has recommended that Congress increase the revolving loan fund for Indian economic development from $25 million to $75 million and provide an additional $200 million federal guarantee and insurance program for such development. *Indian Affairs, The President's Message to the Congress,* 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 894, 900-01 (1970).

For over 150 years this Court has vigorously guarded and defended the right of Indian tribes to be free from state incursion upon matters which touch peripherally, not to say the very heart of, tribal sovereignty. At the same time, the Court has continuously upheld the power of the federal government to be free from state limitations in fashioning its policy for the regulation of Indian affairs. Self-help, self-determination, and Indian economic development presented in this case reflect the nucleus of current federal and Indian interests. These interests must not be subordinated by any court to the general revenue-raising interests of a state. Above all, this Court must not permit these interests to stand or fall without comment by the institution to which history has committed their protection and promotion.

By reason of the foregoing, we respectfully submit that this petition for writ of certiorari should be granted and that the judgment of the New Mexico Court be reversed.

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-738

THE MESCALERO APACHE TRIBE,

Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,

Respondents.

Motion for Leave to File Brief Amicus Curiae

and

Brief for Agua Caliente Band of Mission Indians as Amicus Curiae.

The Agua Caliente Band of Mission Indians hereby respectfully moves for leave to file a Brief *Amicus Curiae* in this case in support of Petitioners, as provided in Rule 42 of the Rules of this Court. The consent of the attorneys for the Petitioners has been obtained. The consent of the attorneys for the Respondents was requested but refused.

The Agua Caliente Band of Mission Indians has been recognized by the Federal Government for nearly

a hundred years as a duly constituted American Indian Tribe. Their reservation is located within the geographical boundaries of the State of California and the County of Riverside. It has sometimes been referred to as "a checkerboard" reservation by reason of the fact that the Federal Government originally granted all of the odd numbered sections of land in the locale to the Southern Pacific Railroad and the even numbered sections to the Agua Caliente Indians.

No significant economic development took place on the Indian sections of land until after 1955 when Congress for the first time authorized long term leasing thereof. Thus, through the vehicle of long term leasing the Indians initiated a program of economic development but as soon as they realized some income therefrom, they encountered a jurisdictional dispute with the County of Riverside who, under California's possessory interest law, decided to tax lessees of Indian trust lands.

The negative impact of such a tax made the Agua Caliente Indians acutely aware of what Chief Justice John Marshall meant when he said, "The power to tax is the power to destroy." As a consequence, the Agua Caliente Indians have sought the assistance of the United States courts in their conflict with the County of Riverside, and in so doing have become aware of the national pattern presently pursued by local governments to interfere with tribal self-government by imposing various types of taxes that tend to destroy the economic development programs undertaken by Indian

tribes. With this in mind, the Agua Caliente Indians feel that their contribution in the form of *Amicus Curiae* should assist this Honorable Court in its determination of a critical legal issue involving Indian Tribes throughout the country.

Wherefore, it is respectfully prayed that this Motion for Leave to File the *Amicus Curiae* and Brief be granted.

RAYMOND C. SIMPSON,
AGUA CALIENTE BAND OF
MISSION INDIANS,
By RAYMOND C. SIMPSON,
Tribal Attorney.

INTEREST OF AMICUS CURIAE.

The Agua Caliente Band of Mission Indians is a duly recognized tribe of American Indians whose reservation is located in the State of California. The lands comprising their reservation are valuable from an appraisal point of view but they can't eat dirt so it must be deemed virtually valueless until they are first economically developed. Toward this end the Indians have made a most diligent effort through active implementation of the long term leasing program authorized by Congress in 1955.

After the passage of nearly sixteen years, these efforts have led to realized income from only five percent of the reservation lands, because they were seriously frustrated and definitely deterred in 1961 when the County of Riverside decided to depart from their "hands off" policy respecting Indian trust lands by imposing a possessory interest tax upon the lessees of their Indian trust lands. The tribe regarded this as an unwarranted and illegal assertion of jurisdiction, so they filed an action against the County known as *The Agua Caliente Band of Mission Indians, et al. v. The County of Riverside*, which is presently pending before this Honorable Court as Docket No. 71-183. Hence, when Respondents undertake to circumvent the sovereignty of the Mescalero Apache Tribe by imposing taxes on a tribal entity, they thereby create a roadblock for the economic development of the Tribe, and as an American Indian Tribe attempting to achieve economic development of its reservation lands, the Agua Caliente Band of Mission Indians therefore has a truly vital interest in the outcome of this case.

Questions Presented.

The questions presented by the case at bar are:

1. Does the taxation invoked by the Respondents constitute an interference with the sovereignty of the Mescalero Apache Tribe?

2. Does this taxation by Respondents frustrate a clear federal policy and program of encouraging Indian tribes to pursue programs designed to produce economic development for the tribes?

REASONS FOR GRANTING THE WRIT.

Amicus joins Petitioners in asserting all the reasons set forth in the Petition for a Writ of Certiorari. The petition comprehensively discusses the various areas in which the courts below erred, and states excellent reasons why this Honorable Court should review the matter. *Amicus* desires to place special emphasis in this brief on the consequences of the decision below for Indians throughout this nation and its negative impact on Federal Indian policy.

I.

Taxation by the State of New Mexico of the Personal Property of an Indian Tribe or the Imposition of a Privilege Tax Upon an Indian Tribal Enterprise Definitely Frustrates a Clear Federal Policy to Produce Economic Development Upon Indian Reservations.

On July 8, 1970, President Nixon in a Message to Congress, said:

> "The destiny of Indians and Indian communities throughout the United States is dependent upon their ability to utilize productively their remaining lands and natural resources. The federal gov-

ernment has acknowledged its trust responsibility to Indians, which arises out of a history of unfortunate relations between the nation and its original inhabitants. In pursuance and fulfillment of this responsibility, the government has afforded certain advantages to its Indian wards. Special treatment and programs for Indians are necessary to compensate for unconscionable dealings with the Indians in the past and to remedy the most alarming present state of abysmal poverty and despair that typifies Indian communities."

It is the primary purpose of the Bureau of Indian Affairs to implement a federal policy of changing this situation. Every year, as part of its proposed budget for the coming fiscal year, the Bureau of Indian Affairs makes the following statement to the House and Senate Appropriation Subcommittees considering its budget request:

"The ultimate goals of the Bureau of Indian Affairs for the Indian people are maximum economic self-sufficiency, equal participation in American life and equal citizenship privileges and responsibilities. The Bureau is working toward the attainment of these goals through two basic programs, one of which is education, and the other is the economic development of reservation resources."

The United States recognized that the reservation system imposed severe limitations on the ability of Indians to maintain a livelihood. Limitation of land area changed traditional patterns of living; confinement to lands which were unfertile and short of water made it difficult to eke out even a subsistence standard of living; and removal to new, often strange areas was

[illegible]tive of family and community which is the basis [illegible] identity and social structure.

With a gradual decline in direct subsidies and a [illegible]tion that paternalism would only foster con[illegible] dependence, there emerged a Federal policy of [illegible]raging economic development and self-sufficiency. This policy was implemented by means of several [illegible]rams and incentives. The future of those programs [illegible] grave doubt if Indians lose by judicial fiat the [illegible] but important margin of advantage Congress has [illegible]ed them through exemption of their land and its [illegible]ome from taxation. As this Court noted in *Choate v. [illegible]*, 224 U.S. 665 (1912) that tax exemption is a [illegible]perty right vested in the Indians.

This Court has many times considered whether var[illegible] forms of state and federal taxation are applicable [illegible] Indians. The case at bar, however, presents a serious [illegible] question for the Court's decision. This Court's de[illegible] will definitely determine the successor or failure [illegible] a Federal policy designed to produce economic de[illegible]ment and self-sufficiency for Indians and Indian [illegible]prises. The purpose of this Federal policy is clearly [illegible]ability of the Indian enterprise, and the measure [illegible] the Federal policy's success is the degree of eco[illegible]ic improvement in the Indians' economic position. [illegible], it must be acknowledged that the taxes by the [illegible] of New Mexico directly interfere with the Federal [illegible] goal. A matter of such grave importance should [illegible]mand the attention of this Court. *Williams v. Lee*, [illegible] U.S. 217 (1959).

II.

Taxation by the State of New Mexico Upon Personal Property Owned by an Indian Tribe Over the Imposition of a Privilege Tax Upon a Tribally Operated Enterprise Constitutes an Illegal Interference With Tribal Sovereignty.

From the earliest years of the Republic Indian tribes have been recognized as "distinct, independent, political communities." *Worcester v. Georgia*, 6 Pet. 515, 559 (1832), and, as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty. Thus, treaties and statutes of Congress have been looked to by the courts as limitations upon original tribal powers, or, at most, evidences of recognition of such powers rather than as the direct source of tribal powers. This is but an application of the general principal that "it is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror." *Wall v. Williamson*, 8 Ala. 48, 51. In fact, in 1959 the United States Supreme Court made it clear that the law had not changed on this subject when it stated "over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained." *Williams v. Lee*, 358 U.S. 217, 219. The test of whether a State statute may be enforced upon an Indian reservation is "whether the application of that law would interfere with reservation self-government." Organized *Village of Kake v. Egan*, 369 U.S. 60, 67-8, 75 (1962).

Perhaps the most basic principle of all Indian law, supported by a host of decisions, is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express Acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian Tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. Statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty, and therefore properly falls within the statutory category, "powers vested in any Indian tribe or Tribal Council by existing law."

The Acts of Congress which appears to limit the powers of Indian tribes are not to be unduly extended by doubtful inference. What was said in the case of *In re Mayfield*, 141 U.S. 107 is still pertinent:

> "The policy of Congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization. We are bound to recognize and respect such policy and to construe the acts of the legislative authority in consonance therewith."

In point of form, it is immaterial whether the powers of an Indian tribe are expressed and exercised through customs handed down by word of mouth or through written constitutions and statutes. In either case the laws of the Indian tribe owe their force to the will of the members of the tribe. The status of Indian nations or tribes, preserving their political entity under the decisions of the Supreme Court, has been summed up in Felix F. Cohen's "Handbook of Federal Indian Law", at page 122, as follows:

> "The whole course of judicial decision and the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to legislative powers of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government."

In *United States v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 1112, the Court sums up the status of the Indian in the following language:

> "They were, and always have been, regarded as having a semi-independent position when they pre-

served their tribal relation; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, thus far not brought under the laws of the Union or of the State within the limits they reside."

The acknowledgment of tribal sovereignty or autonomy by the courts of the United States has not been a matter of lip service to a venerable but out-moded theory. The doctrine has been followed through the most recent cases, and from time to time carried to new implications. Moreover, it has been administered by the courts in a spirit of genuine respect. In fact, the painstaking analysis by the Supreme Court of tribal laws and constitutional provisions in the Cherokee intermarriage cases, (203 U.S. 706) is typical, and exhibits a degree of respect proper to the laws of a sovereign nation.

The whole course of congressional legislation with respect to the Indians has been based upon a recognition of tribal autonomy. As was said in a Report of the Senate Judiciary Committee (prior to the enactment of the United States Code, Title 18, Sec. 548); "Their right of self-government, and to administer justice among themselves, after their rude fashion, even to inflicting the death penalty, has never been questioned." (Senate Report No. 268, 41st Congress, 3rd Session). In fact, the courts have consistently seen fit to view the status of Indian tribes and the sovereignty possessed by them as being above the sovereignty accorded states.

For instance, in the case of *Native American Church v. Navajo Tribal Council*, 272 F. 2d 131 (1959), the Court said:

> "But as declared in the decisions hereinbefore discussed, Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States."

From the foregoing it is apparent that the Mescalero Apache Tribe possesses that all important attribute of sovereignty known as the power to tax. It must be conceded that this is an essential if self-government by an Indian tribe is to be meaningful and compatible with the recognition evidenced by the many decisions by the United States Supreme Court dealing with the subject. The Tribe can only be deprived of this right by an Act of Congress. Hence, any taxation by the State of New Mexico of personal property owned by an Indian tribe or the imposition of a privilege tax upon an Indian tribal enterprise clearly constitutes an interference with tribal sovereignty, and such taxation therefore should not be allowed.

Conclusion.

Certiorari should be granted in this case because of its profound importance to all Indian tribes seeking economic development and self-sufficiency. Imposition of a personal property tax or a privilege tax by the State of New Mexico upon the wholly owned economic enterprise of the Mescalero Apache Tribe clearly frustrates a Federal policy designed to encourage economic development of reservation resources.

For the reasons set forth in this Brief, the Agua Caliente Band of Mission Indians urge this Honorable Court to grant certiorari so that this vitally important case may be decided on its merits.

Respectfully submitted,

RAYMOND C. SIMPSON,
Attorneys for Agua Caliente Band of Mission Indians as Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-738

THE MESCALERO APACHE TRIBE, *Petitioner*,

v.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, *Respondents*.

[illegible] in Opposition to Petition for Writ of Certiorari to [illegible] Court of Appeals of the State of New Mexico

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JURISDICTION

[illegible] Mescalero Apache Tribe is engaged in a business [illegible]prise, a ski resort, which is located primarily on [illegible] belonging to the U.S. Forest Service which have [illegible]leased to the Tribe for a period of thirty years. [illegible] New Mexico Bureau of Revenue assessed the Tribe [illegible]mpensating tax upon the purchase price of mate- [illegible] used to construct two ski lifts at the ski resort. [illegible]ribe protested the assessment. The compensating

tax imposed on the Tribe was upon the Tribe's storage, use or other consumption in New Mexico of materials purchased from a retailer. Section 72-17-3, N.M.S.A. 1953 Comp., (Repealed July 1, 1967). The compensating tax was not a tax on personal property, but was a tax on the storage, use or other consumption of tangible personal property.

The Tribe reported and paid to the New Mexico Bureau of Revenue a tax on the gross receipts of its business activities pursuant to the provisions of the Emergency School Tax Act, as amended, being §§ 72-16-1 through 72-16-47, N.M.S.A. 1953 Comp., (Repealed July 1, 1967). Subsequent to payment the Tribe claimed for refund of the emergency school tax paid pursuant to § 72-13-40, N.M.S.A. 1953 (Supp. 1969) of the Tax Administration Act.

The protest and claim for refund were denied by a Decision and Order of the Commissioner of Revenue dated December 23, 1970. The matter was appealed to the Court of Appeals of the State of New Mexico pursuant to §§ 16-7-8(F) and 72-13-39, N.M.S.A. 1953 Comp. On August 6, 1971, the Court of Appeals of the State of New Mexico affirmed the decision of the Commissioner of Revenue, by a Court divided on rationale. A timely Motion for Re-hearing was filed and an Order denying the Motion for Re-hearing was entered September 7, 1971. A timely Petition for Writ of Certiorari was filed with the Supreme Court of the State of New Mexico on September 28, 1971, and an order denying the Petition for Writ of Certiorari was entered in this cause by the New Mexico appellate courts.

Respondent contends that this Court does not have jurisdiction of the Petition for Writ of Certiorari

under 28 U.S.C. § 1257(3). The decision of the New Mexico Court of Appeals gives validity to both Petitioner's 1852 treaty with the United States of America, 10 Stat. 979, and The Enabling Act for New Mexico, 36 Stat. 557, ch. 310. Petitioner has not shown that any provision of either the New Mexico Emergency School Tax Act or the New Mexico Compensating Tax Act of 1939 are repugnant to the United States Constitution, treaties or laws of the United States.

Furthermore, no title, right, privilege or immunity of Petitioner under the United States Constitution, treaties or statutes of, or commission held or authority exercised under, the United States has been denied by the decision of the New Mexico Court of Appeals.

ARGUMENT

Petitioner has chosen to engage in business in the State of New Mexico outside the boundaries of its reservation. By so doing, it has entered into competition with other business entities. The fact that the revenue from Petitioner's activities is being used for the educational, social and economic welfare of the Mescalero Apache people is of no significant difference from the use of revenue by other business entities. Petitioner has not shown why taxation of its business activity will lead to its "eventual destruction" as a tribal entity and there is no reason to suppose that this will be the result.

Petitioner contends that Congress has elected to control Petitioner's off-reservation business activities to such a degree that the taxation of its use of tangible personal property and its receipts from the sale of services and property would be repugnant to the Commerce Clause of the United States Constitution,

Article I, Section 8, Clause 3. Congressional control of liquor sales to Indians and cases concerning this control are relied on by Petitioner. See *United States* v. *Holliday*, 70 U.S. (3 Wall) 407, 18 L.Ed. 182 (1866); *United States* v. *43 Gallons of Whiskey*, 93 U.S. (3 Otto) 188, 23 L.Ed. 846 (1876). In discussing the control exercised by Congress, Mr. Justice Miller in the *Holliday* case stated: "...The law before us professes to regulate traffic and intercourse with the Indian Tribes. It manifestly does both. It relates to *buying and selling* and exchanging commodities, which is the essence of all commerce; and it regulates the *intercourse* between the citizens of the United States and those tribes, which is another branch of commerce, and a very important one." (emphasis supplied) (70 U.S. 407, 417). In the transactions which resulted in the imposition of the taxes at issue here, there is no Congressional control or regulation over either sellers to Petitioner of materials or buyers of Petitioner's services or property. Congress has usually not exercised such sweeping regulation as it has done with regard to the commerce of liquor with Indian tribes. Cohen F.S., *Federal Indian Law* (1942), 91. Petitioner has stated at page 15 of its Petition for Writ of Certiorari, "A review of the Stipulation of Facts and the federal statutes and regulations involved, indicate a far greater control here than that imposed on the Indian trader in *Warren Trading Post* v. *Arizona Tax Commission*, ... [380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed. 2d 165 (1965)]." In the *Warren Trading Post* case, Mr. Justice Black stated: "... [T]he commissioner has promulgated detailed regulations prescribing in the most minute fashion who may qualify to be a trader and how he shall be licensed; penalties for acting as a trader without a license; conditions under which government employees may trade with

Indians; articles that cannot be sold to Indians; and conduct forbidden on a licensed trader's premises. . . ." (380 U.S. 685, 689). This type of control is not present in the transactions at issue in this case. Title 25, § 470 of the United States Code provides merely for loans from the Secretary of the Interior to Indian chartered corporations. There is no restriction as to the sellers of materials to the Petitioner or buyers of property or services from Petitioner. Title 25, Part 91 of the Code of Federal Regulations contains no such restriction. The fact that purchases of material which were used to construct the two ski lifts at the ski resort were subject to and were approved by the Bureau of Indian Affiairs (Tr. 3) is probably no different than the measure of control exercised by many lenders of money over borrowers of money. Petitioner's suggestion that the leased lands, upon which the ski resort was located, have the same status as trust lands pursuant to 25 U.S.C. § 465 is without support. There is nothing in the record to indicate that the Secretary of the Interior acquired the lands leased by the Petitioner pursuant to U.S.C. § 465. The record indicates that the ski resort is on lands belonging to the U.S. Forest Service which have been leased to the Tribe for a period of thirty years. (Tr. 1) Respondent contends that the distinction between lands leased to an Indian Tribe and lands acquired by the Secretary of the Interior and taken in the name of the United States in trust for an Indian Tribe is obvious and that 25 U.S.C. § 465 is completely irrelevant to this case. Article XI, Section 1 of Respondent's Revised Constitution grants the Mescalero Apache Tribal Council the power to acquire land or interest in lands without the reservation subject to the laws of the United States and the regulations of the Secretary of the Interior. (Tr. 9) The leased

lands were not granted or confirmed to the Petitioner by any act of Congress but rather they were leased from the U.S. Forest Service.

The decision of the New Mexico Court of Appeals does not interfere with Petitioner's right to self-government. The operation of the ski resort is a proprietary function performed by Petitioner and because the function is proprietary, Petitioner is not immune from the taxes which have been imposed. Compare *City of High Point* v. *Duke Power Company,* 120 F.2d 666 (4th Cir. 1941); *State Tax Commission* v. *City of Logan,* 88 Utah 406, 54 P.2d 1197 (1936); *City of Phoenix* v. *State,* 53 Ariz. 28, 85 P.2d 56 (1938). Furthermore, there is nothing in the record to indicate interference with Tribal self-government. Petitioner's contention that the effect of the Court of Appeals' decision is to restrict Indian tribal choices of business ventures and the location of these ventures is unsupported by the record. Even if the Tribe decided to locate such business ventures on the reservation rather than outside the reservation, there is no indication that the influence state taxation might have on this decision would be an interference with Tribal self-government. In *Organized Village of Kate* v. *Egan,* 360 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962), it was recognized by this Court that fishing rights are of vital importance to Indians in Alaska. (369 U.S. 60, 66; 7 L.Ed.2d 573, 578) It is reasonable to assume that the revenue raised from fishing made these rights important and that this revenue would be used for the educational, social and economic welfare of the Organized Village of Kate and the Aragon Community Association. Even though these facts are implicit in the opinion of this Court, it was decided that state regulation of off-reservation fishing

rights did not impinge on treaty-protected reservation self-government.

The Petitioner is not a federal instrumentality under the tests set forth for determining a federal instrumentality in Justice Marshall's dissenting opinion in *Agricultural Nat. Bank.* v. *Tax Commission,* 392 U.S. 339, 88 S.Ct. 2173, 20 L.Ed.2d 1138 (1968), and cases cited therein. The loan to the Petitioner under 25 U.S.C. § 470 was to be for the purpose of promoting economic development of ". . . such tribes and of their members, . . ." but this does not indicate that Petitioner thereby became a federal instrumentality. "Economic development" is an indefinite phrase and could refer to any money or benefit received by the Tribe or any member of the Tribe. In *Leahy* v. *State Treasurer of Oklahoma,* 297 U.S. 420, 56 S.Ct. 507, 80 L.Ed. 771 (1936), the fact that a member of an Indian Tribe was taxed by a state on his share of the income from the mineral resources of the Tribe did not amount to taxation of a federal instrumentality. Respondent contends that if the income of the Tribal member in the *Leahy* case had resulted indirectly from a loan pursuant to 25 U.S.C. § 470 the tribal member would still not be a federal instrumentality. The fact that the Petitioner in this case used materials and had receipts from selling property or services because of a loan under § 470 does not indicate that Petitioner became a federal instrumentality. As has previously been argued, Respondent contends 25 U.S.C. § 465 is irrelevant to this case.

There is nothing in the record to support Petitioner's statement on page 14 of its Petition for Writ of Certiorari that ". . . [T]his money would not be returned

to the Tribe in the form of educational benefits as the federal government presently meets the cost of educating the Indian tribes. 25 CFR pt. 33. . . ." Nowhere in Title 25, Part 33 of the Code of Federal Regulations is there an indication that the federal government meets the complete costs of educating the Indian tribes. Section 33.4(a) of Part 33 refers to the expenditure of monies appropriated by Congress under contracts with state authorities. Section 33.4(b) states in part: ". . . This Federal assistance program shall be based on the need of the district for *supplemental funds* to maintain an adequate school after *evidence of reasonable tax effort* and receipt of *other aids to the district* without reflection on the status of Indian children." (emphasis supplied)

Petitioner contends that the portion of the New Mexico Enabling Act of June 20, 1910, 36 Statutes at Large, Chapter 310, Section 2, Clause 2, which provides that the state is not precluded from taxing, as other lands and other property are taxed, any lands and other property outside an Indian Reservation owned or held by any Indian, does not apply to Indian Tribes. Respondent submits that this provision does apply to Indian Tribes because of the next phrase in the Act which refers to "Indian [illegible] Indians". It would have been unnecessary for Congress to refer to "Indians" with regard to lands granted, acquired or confirmed by Act of Congress if the preceding phrase had applied only to an individual Indian. Respondent contends that the term "Indian" refers to Indian Tribes as well as an individual Indian.

United States v. *Rickert,* 188 U.S. 432, 28 S.Ct. 478, 47 L.Ed. 532 (1903), which is relied on by Petitioner,

concerns lands allotted to Indians and personal property issued by the United States to Indians holding these allotments which property was used on the allotted lands. These lands were allotted under a general allotment Act of Congress. The South Dakota Enabling Act, 25 Stat. 677, and the South Dakota Constitution, Article 22, subd. 2, allowed taxing, as other lands, "... any lands owned or held by any Indian who had severed his tribal relation, and has obtained from the United States, or any person, a title thereto by patent or other grant." South Dakota had imposed a tax on allotted lands and personal property relying on its Enabling Act and Constitution. This Court found that the patent or grant referred to had not been issued and that the tax was improper. There is nothing in the record to indicate that Petitioner was operating on allotted lands. The *Rickert* case does not support Petitioner's position.

CONCLUSION

Respondent respectfully submits that the petition for writ of certiorari be denied.

Respectfully submitted,

DAVID L. NORVELL
Attorney General
P. O. Box 2246
Santa Fe, New Mexico 87501
Attorney for Respondents

...e Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-738

THE MESCALERO APACHE TRIBE, PETITIONER

v.

...LIN JONES, COMMISSIONER OF THE BUREAU OF ...NUE OF THE STATE OF NEW MEXICO, ET AL.

...TION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO

...ANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Solicitor General, on behalf of the United ..., submits this memorandum *amicus curiae* in ... of the petition for a writ of certiorari.

QUESTIONS PRESENTED

Whether the State of New Mexico has authority ...ose a gross revenue tax on the income from a ...sports and resort facility financed by the Fed-Government and operated by the Mescalero ... Tribe on government land leased to the Tribe.

Whether the State of New Mexico has author-... impose a tax on personal property owned by ...be and used in connection with the facility ...d on the leased land.

...-550—72——1

INTEREST OF THE UNITED STATES

The New Mexico Court of Appeals has held that the State of New Mexico (1) has the right to tax the petitioners as a tribe for revenue produced under federal supervision on federally owned tax-exempt land and (2) to impose a use tax on personal property used by the Tribe on the land. The imposition of these state taxes is detrimental to important federal programs for Indian economic betterment and, in our view, is contrary to congressionally granted rights and immunities of the tribes.

STATEMENT

The essential facts were stipulated below (App. A, *infra* pp. 11–16).

The Mescalero Apache Tribe[1] leased for 30 years from the United States 80 acres in a national forest adjacent to the Tribe's Reservation for the purpose of developing and operating a winter sports and resort facility (App, *infra*, pp. 11–12). The rental under the lease, the price of equipment and the construction of the resort were all financed with money loaned to the Tribe by the government under the authority of 25 U.S.C. 470 (*id.* at 12–13). The Tribe

[1] The Tribe is organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. 476. That far-reaching Act, 25 U.S.C. 461 *et seq.*, was designed, *inter alia*, to halt alienation of Indian land, to provide land for the Indians, and to stabilize tribal organizations. See U.S. Department of the Interior, *Federal Indian Law*, 128–129 (1958). Both 25 U.S.C. 470, under which the government made the present loan, and 25 U.S.C. 465, which provides a broad tax exemption, are provisions of the Indian Reorganization Act.

built and operated the resort as directed by the terms of the lease and under supervision of the Department of the Interior (*ibid.*). The basic purpose of the resort is to provide revenue to be used for the educational, social and economic welfare of the Tribe (*id.* at 12). The resort also provides job training and jobs for some 20 to 30 members of the Tribe (*ibid.*).

The Enabling Act for New Mexico, Section 2, Clause Second, 36 Stat. 557, 558–559, prohibits the state from taxing "lands or property" belonging to the United States, or hereafter "acquired by the United States or reserved for its use." The Act further provides that nothing therein "shall preclude the said State from taxing, as other lands and other property are taxed, any land and other property outside of an Indian Reservation owned or held by any Indian, save and except such lands * * * as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe."

25 U.S.C. 465, under which the Tribe acquired the leasehold interest in the national forest lands in question, provides that "such lands or rights shall be exempt from State and local taxation."[2]

The State of New Mexico imposed on the Tribe two taxes of general application as a result of the Tribe's operation of the resort:

1. A tax on the privilege of doing business of 2 percent of annual gross receipts. The Tribe

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[2] The statutes involved are more fully set forth at Pet. 3–5 and Pet. App. C.

paid under protest to the State $26,086.47 for the period from October 1, 1963, through December 31, 1966, and filed a demand for refund.

2. A tax on the storage, use or consumption of personal property in the amount of $5,887.19 plus penalties and interest based on the sales price of materials used to construct two ski lifts at the resort. This tax was not paid but was protested. [App., *infra*, pp. 13–15.]

The protest and claim for refund were denied by the Commissioner of Revenue of the State of New Mexico (Brief in Opp. 2). The matter was appealed to the Court of Appeals of the State of New Mexico which affirmed, on divided grounds, the decision of the Commissioner of Revenue (Pet. App.). A motion for rehearing was denied and a timely petition for writ of certiorari was filed with the Supreme Court of the State of New Mexico, which denied the petition (Brief in Opp. 2). A timely petition for a writ of certiorari was then filed in this Court.

ARGUMENT

So far as we are able to determine, this case presents the first attempt by a state to tax an Indian tribe as a tribe on the revenues produced by the use of tax-exempt tribally held lands. The question of state authority in this area is of national importance because of the serious detrimental effect such taxes can have on the economic well being of Indian tribes and on major federal programs intended to encourage Indian economic development. The decision below, we submit, upholds an unauthorized extension of state

jurisdiction to tax which would unwarrantably interfere with these federal programs, and review by this Court is therefore appropriate.

1. The State apparently does not contend that it is empowered to impose a tax directly on the land involved in this case or on the Tribe's leasehold interest in the land. Indeed, there is no judicial authority upholding state taxation of land owned by the federal government or of a leasehold interest in such land where the lessee is an Indian tribe. Here title to the land on which the resort is located is in the federal government (App. 12), and the leasehold right of the Tribe is specifically exempted from taxation under 25 U.S.C. 465. Moreover, the exemption under 25 U.S.C. 465 is fully consistent with the New Mexico Enabling Act, *supra*, which provides that new lands may be acquired for the Indians under "any act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as Congress has prescribed or may hereafter prescribe". 25 U.S.C. 465 provides just such a tax exemption.

For present purposes it is of no consequence whether the land in question was original reservation land, or land later acquired by the government or made available by the government for tribal use. The purpose of 25 U.S.C. 465 and 470 is to allow acquisition of additional land or rights in land for the benefit of Indians or Indian tribes. *Stephens* v. *Commissioner of Revenue*, Nos. 26193, 26281, C.A. 9, decided November 20, 1971; see also *United States* v. *Rickert*, 188 U.S. 432, 437. Moreover, "[l]ands which are occupied by a tribe or tribes of Indians have always

been regarded as not within the jurisdiction of the States for purposes of State property taxation," U.S. Department of the Interior, *Federal Indian Law*, at 850. See *The Kansas Indians*, 5 Wall. 737, 755–757; *The New York Indians*, 5 Wall. 761, 771; *United States* v. *Rickert*, 188 U.S. 432, 437.

2. Early cases considered both the Indian tribes and their *lessees* exempt from state taxation of Indian land or income produced from such land. *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U.S. 522; *Gillespie* v. *Oklahoma*, 257 U.S. 501. The immunity from taxation of lessees of the government was overruled in *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376, but the immunity of the government itself, or here, the Indian tribe was not overruled. Thus, this Court in *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342, 353, in holding that Oklahoma could impose various taxes on the Texas Company based on production from Indian lands, carefully pointed out: "These cases present no question concerning the immunity of the Indian lands themselves from state taxation. There is no possibility that ultimate liability for the taxes may fall upon the owner of the land." *Federal Indian Law, supra* at 853, sums up the changes that have thus occurred in the federal instrumentality doctrine as follows:

> There seems little doubt in view of the foregoing that the validity, if not the scope, of the instrumentality doctrine, insofar as it relates to Indians, their property, and their affairs, remains unchanged. *For just as the right to tax the lessee of State lands does not include the right to tax the State itself, so the right to tax*

the lessee of Indian lands does not imply a right to tax the Indians or their property. [Emphasis added.]

This long-estabilshed distinction is reflected in the federal exemption statutes at issue in the present case. Properly interpreted, we submit, the exemption conferred by 25 U.S.C. 465 applies not only to taxes imposed on the Tribe's leasehold and other interests in real property, but also to taxation of the proceeds derived by the Tribe from the use of their real property. For the basic purpose of the tax exemption is to enable the land reserved for the Indians' use to serve as a tax-free base for their economic support and well being. Indeed, in the exceptional circumstances where Congress has wished to permit state taxation of the proceeds derived by Indians from Indian lands, it has done so by means of carefully delimited, specific legislation. For example, 25 U.S.C. 398 specifically authorizes the states to tax mineral production on unallotted tribal lands as if produced on unrestricted land. Since there is no such authorization for the New Mexico gross receipts tax at issue here, it is in our view barred by 25 U.S.C. 465. See *Squire* v. *Capoeman,* 351 U.S. 1. *Stephens* v. *Commissioner of Revenue, supra.*

For similar reasons, we believe that the federal statutory exemption applies also to the imposition here of New Mexico's use tax. In *United States* v. *Rickert, supra,* decided by this Court in 1903, the State of South Dakota attempted to collect a tax on permanent improvements that individual Indians had placed on their allotted lands and on personal

property used by the Indians in farming the land. In a suit brought by the United States to enjoin the collection of the tax, this Court held that even though South Dakota may not classify the improvements as part of the realty "[t]he fact remains that the improvements here in question are essentially a part of the lands, and their use by the Indians is necessary to effectuate the policy of the United States" 188 U.S. at 442. As to cattle, horses and other property of like character, the Court said (188 U.S. at 443):

> * * * The personal property in question was purchased with the money of the Government and was furnished to the Indians in order to maintain them on the land allotted during the period of the trust estate, and to induce them to adopt the habits of civilized life. It was, in fact, the property of the United States, and was put into the hands of the Indians to be used in execution of the purpose of the Government in reference to them. The assessment and taxation of the personal property would necessarily have the effect to defeat that purpose.

See also *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685.

A fortiori, where the undertaking is a tribal one, it is proper to construe the applicable federal statutory exemption, which was designed for the Indians' economic betterment, to bar state taxation of the personal property used by the Tribe for the improvement of tribal land. As petitioner correctly states (Pet. 7): "Tribal property was not subject to state taxation when the horse and plow were utilized for economic

development. The means have changed, such as the ski enterprise in this case, but the purpose is unchanged."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the questions presented warrant review by this Court and the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.
KENT FRIZZELL,
Assistant Attorney General.
HARRY R. SACHSE,
Assistant to the Solicitor General.

FEBRUARY 1972.

APPENDIX

Before the Commissioner of Revenue State of New Mexico

In the Matter of the Protest of the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises, I.D. No. 14-703019-00, Against Bureau of Revenue Assessment No. 96224 for Compensating Tax for the Period 9/1/63 to 4/30/68; and In the Matter of the Claim for Refund of the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises, for Emergency School Tax for the Period 10/1/63 to 11/31/66.

Stipulation of Facts[1]

The Mescalero Apache Tribe, hereinafter called "Tribe" and the Bureau of Revenue, State of New Mexico, hereinafter called "Bureau" hereby stipulate and agree, through their respective attorneys, as follows:

1. That the Tribe is an Indian Tribe which has a Treaty with the United States of America, a copy of which Treaty is marked Exhibit 1, attached hereto and incorporated herein by reference as if set forth in full.

2. That certain lands in Lincoln and Otero Counties of the State of New Mexico have been set aside as a reservation for the Tribe and on which the Mescalero Apache people reside and tribal business is primarily conducted.

3. Pursuant to 25 U.S.C.A., Section 476, the Tribe, in 1934, adopted a Constitution, a copy of which is

[1] In this appendix the attachments to the stipulation of facts are omitted.

marked Exhibit 2, attached hereto and incorporated herein by reference as if set forth in full.

4. Sierra Blanca Ski Enterprises is a ski resort located in Otero and Lincoln Counties, New Mexico, and is exclusively owned and operated by the Tribe. The ski resort is on lands belonging to U.S. Forest Service which have been leased to the Tribe for a period of thirty (30) years. The ski resort area is bordered on the south by the Tribe's reservation and some of the cross-country ski trails are located on the reservation, but no part of the buildings or other equipment used at the ski resort is located within the now existing boundaries of the Tribe's reservation. That a map of said area is marked Exhibit 3, attached hereto and incorporated herein by reference. The Sierra Blanca Ski Enterprises, including the lease with the U.S. Forest Service, was entered into by the Tribe pursuant to Article XI, Section 1 of the Tribe's Constitution which is referred to in paragraph 3, above.

5. The enterprise at Sierra Blanca was entered into by the Tribe after a feasibility study was made by the Bureau of Indian Affairs of the United States of America, which feasibility study was paid for by the federal government.

6. The basic purpose of the ski resort is to provide revenue to the Tribe in lieu of raising revenue through the taxation of Tribal members or in some other manner. The revenue from the ski resort is to be used and is being used for the educational, social and economic welfare of the Mescalero Apache people. The ski resort also provides a job training center for the Mescalero Apache people and approximately 20 to 30 Mescalero Apache people are employed at the ski resort in a job training capacity.

7. The purchase and construction of the ski resort was financed completely by a loan to the Tribe by the federal government under 25 U.S.C.A., Section 470.

8. The approval of the Bureau of Indian Affairs of the Department of the Interior of the United States is required in several areas of the operation at the ski resort. For example, the approval of the Bureau of Indian Affairs must be obtained on:

a. The budget for each fiscal year.

b. The leasing of equipment or other property for use by the Tribe.

c. The leasing of facilities at the ski resort to concessionaires.

d. The plans and designs for the construction of any additional facilities or improvements.

e. The disposal of all property other than expendable items.

f. The form and contents of monthly interim reports and accounting records of the operation.

g. The form and contents of an annual audit which is to be conducted, and the licensed public accountant or firm of public accountants who will conduct the annual audit.

9. The Bureau conducted an audit in May of 1968 which resulted in Assessment No. 96224 being issued against the Tribe for compensating tax in the amount of $5,887.19, plus interest of $893.82 and penalties of $[illegible].73, a copy of which assessment is marked Exhibit [illegible] attached hereto and incorporated herein by reference. The assessment can be broken down for the following periods: For September 1, 1963, to December 31, 1965, principal—$4,925.01; penalty—$492.50; interest $232.89. For January 1, 1966, to April 30, 1968, principal—$962.18; penalty—$96.23; interest $[illegible].92. The assessment can also be broken down as follows: For September 1, 1963 to August 31, 1965,

principal—$776.74; penalty—$77.67; interest—$167.97. For September 1, 1965 to April 30, 1968, principal—$5,110.45; penalty—$511.05; interest—$725.85. The compensating tax assessed was a result of the compensating tax being applied against the purchase price of materials which were used to construct two ski lifts at the ski resort. At the time the audit was conducted and the assessment issued, the ski lifts had been completed and were permanently attached to the realty.

10. All the materials against which the compensating tax was assessed were purchased with money borrowed by the Tribe from the federal government pursuant to 25 U.S.C.A. Section 470, and the purchases of all such materials were subject to and were approved by the Bureau of Indian Affairs of the federal government.

11. The plans and specifications for the construction of the ski lift at the ski resort were approved by the federal government as evidenced by the letter to Mr. Wendell Chino, dated October 12, 1965, a copy of which letter is marked Exhibit 5, attached hereto and incorporated herein as if set forth in full.

12. As a result of such assessment, the Tribe filed a written protest, a copy of which is marked Exhibit 6, attached hereto and incorporated herein by reference as if set forth in full. The written protest was timely filed by the Tribe as required by Section 72-13-38 of the Tax Administration Act. The written protest is hereby amended to include the additional ground on which the Tribe protests the assessment, namely the assessment is barred by the Statute of Limitations and that the Tribe is allowed to raise this defense at the hearing on its Protest of the Assessment.

13. That in December of 1967, the Tribe received the attached letter, marked Exhibit 7, and that such

letter was written by the then Chief Counsel of the Bureau and that said letter is incorporated herein as if set forth in full. That in April of 1968, the Tribe received the attached letter marked Exhibit 8, and that such letter was written by the then General Counsel of the Bureau and that said letter is incorporated herein as if set forth in full.

14. That during the period of October 1, 1963, through December 31, 1965, the Tribe paid $15,529.69, and during the period of January 1, 1966, through December 31, 1966, the Tribe paid $10,556.78 in taxes to the Bureau on gross receipts received from its operation at the ski resort. That said sum was paid under the Emergency School Tax Act as amended, being Sections 72–16–1 through 72–16–47, N.M.S.A. 1953 Comp.

15. That a Claim for Refund of the Emergency School Taxes paid was filed by the Tribe on December 31, 1969; a copy of said Claim for Refund is marked Exhibit 6, attached hereto and the Claim for Refund, if set for in full. That by letter dated January 19, 1970, the Tribe's Claim for Refund was denied and within thirty (30) days from this denial, the Tribe filed a written request for a hearing on its Claim pursuant to Section 72–13–38, N.M.S.A. 1953 Comp.

16. That the Tribe's Petition of Protest, being Exhibit 6, attached hereto, and the Claim for Refund, being Exhibit 9, attached hereto, be consolidated and heard at the same administrative hearing, and that at such administrative hearing, the facts and statements contained in this Stipulation shall be treated as having been conclusively established by competent evidence and all such facts and statements shall be applicable to both the Petition of Protest and the Claim for Refund.

17. That it is understood the allegations and theories stated in the Petition of Protest and the Claim for

Refund, being Exhibits 6 and 9 respectively, are to be considered as being the theories and allegations relied on and asserted by the Tribe at the administrative hearing to be held on this matter, but that the statements and facts contained in the Petition of Protest and the Claim for Refund are not stipulated to by the Bureau except as such statements and facts are established by this Stipulation.

18. That C. L. Sonnichsen is a recognized authority on the Mescalero Apache people and that his book entitled *The Mescalero Apaches*, published in 1958 by the University of Oklahoma Press at Norman, Oklahoma, is an accurate recording of factual events concerning the Mescalero Apache people and that judicial notice may be taken of the facts stated therein.

FETTINGER, BLOOM & OVERSTREET,
By S. THOMAS OVERSTREET,
Attorneys for the Mescalero Appache Tribe

ATTORNEY GENERAL OF THE STATE
OF NEW MEXICO,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-738

MESCALERO APACHE TRIBE, *Petitioner*

v.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, AND THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, *Respondents*

RESPONDENT'S RESPONSE TO THE MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The Attorney General of the State of New Mexico submits this response to the Memorandum for the United States *Amicus Curiae.*

QUESTIONS PRESENTED

The respondent is dissatisfied with the presentation of the questions by both the Petitioner and the United States as *amicus curiae.* Under numbered question one, the tax is referred to as " a gross revenue tax on . . . in-

come"; however, the tax is a gross receipts tax on gross receipts. Under numbered question two, the tax is referred to as "a tax on personal property"; however, the tax is a compensating or use tax imposed on the use of tangible personal property.

STATEMENT

The statement of the case by the United States as *amicus curiae* is inaccurate in its reference to the rate of the emergency school tax which was imposed on the Petitioner. (Memorandum Brief 3) The rate of the tax was 3 percent rather than 2 percent. New Mexico Laws of 1963, ch. 325, Sections 6 and 8.

Respondent also contends that the portion of the statement on page 3 of the memorandum of the United States as *amicus curiae* which states:

> "25 U.S.C. 465, under which the Tribe acquired the leasehold interest in the national forest lands in question . . . ."

is an inaccurate statement of fact not supported by the record in this case.

ARGUMENT

The United States has argued that the taxes imposed on the Petitioner can have a serious detrimental effect on the economic well being of Indian tribes and on major federal programs intended to encourage Indian economic benefit. The nature of the detrimental effect is not explained. The imposition of taxes such as those at issue here, may increase the financial burden of any business; however, the imposition of an increased financial burden even if that burden eventually falls

on the United States does not, by itself, vitiate a state tax. See *United States* v. *City of Detroit,* 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed. 2d 424 (1958). There is no showing by the United States of how the imposition of these taxes will interfere with federal programs intended to encourage Indian economic development, and there is no reason to suppose that this will be the result.

1. The United States argues that the leasehold right of the Tribe is specifically exempted from taxation under 25 U.S.C. § 465. The last paragraph of § 465 states:

> "Title to any lands or right acquired pursuant to sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall be taken in the name of the United States in trust *for* the Indian tribe or individual Indian *for which the land is acquired*, and such lands or rights shall be exempted from State and local taxation." (emphasis supplied)

The land upon which Petitioner's ski resort was located belonged to the United States Forest Service and was leased by the United States Forest Service to Petitioner. (Memorandum Brief, Appendix 12.) The title to the land was apparently in the federal government prior to the time the lease with Petitioner was entered into. The land was not *acquired for* Petitioner. If title to the leasehold interest was taken in trust for the Petitioner, the United States would have taken leasehold interest in its own land, in trust for Petitioner. Respondent contends that the record in this case does not indicate that any lands or rights were "acquired" for the Petitioner which could be taken in the name of the United States in trust for the Petitioner because the United States already had title to

these lands or rights. For this reason, Section 25 U.S.C. § 465 is irrelevant to this case.

If Section 25 U.S.C. § 465 is applicable, its application is limited to exempting lands or rights to land from State or local taxation, and the taxes at issue here are not imposed upon Petitioner's land or rights to land. As the New Mexico Court of Appeals stated in its opinion:

> "...The tax involved here applies neither to land nor to rights acquired in land. The tax under the old 'compensating or use tax' is on tangible personal property, see § 72-17-3, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2) and under the Emergency School Tax Act on the privilege of engaging in business activities within New Mexico. See § 72-16-14.1, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2); see *Edmunds* v. *Bureau of Revenue,* 64 N.M. 454, 330 P.2d 131 (1958). . . ." *Mescalero Apache Tribe* v. *Jones,* 83 N.M. 158, 489 P.2d 666, 669 (Ct. App. 1971).

2. The United States contends that Section 25 U.S.C. § 465 should be interpreted as an exemption from taxation, "... of the proceeds derived by the Tribe from the use of their real property. . . ." (Memorandum Brief, 7) The general rule is that exemptions to tax laws should be clearly expressed. See *Superintendent of Five Civilized Tribes* v. *Commissioner of Internal Revenue,* 295 U.S. 418, 420-21, 55 S.Ct. 820, 822, 79 L.Ed. 1517, 1519 (1935); *Squire* v. *Capoeman,* 351 U.S. 1, 6, 76 S.Ct. 611, 615, 100 L.Ed. 883, 889 (1956); *Holt* v. *Commissioner of Internal Revenue,* 364 F.2d 38 (8th Cir. 1966), cert. denied 386 U.S. 931, 87 S.Ct. 952, 17 L.Ed. 2d 805. The interpretation suggested by the United States is far beyond the clear expression of the exemption 25 U.S.C. § 465 and would cause that sec-

tion to be in conflict with the Enabling Act for New Mexico, 36 Stat. 557, Section 2, Clause 2. That clause of the Enabling Act states in part:

> ". . . ; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing, as other lands and other property are taxed, any lands or other property outside of an Indian reservation owned or held by any Indian, save and except such *lands* as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such *lands* shall be exempt from taxation by said State so long and to such extent as the Congress has prescribed or may hereafter prescribe." (emphasis supplied)

The Enabling Act grants the state the power to tax lands and other property outside an Indian reservation but it excepts and exempts after-acquired *lands* which are granted or confirmed to Indians to the extent Congress may prescribe. The type of tax referred to is a tax on land. Even if 25 U.S.C. § 465 has extended this type of tax to include a tax on rights in land, it clearly has not exempted from tax the privilege of engaging in business or the use of tangible personal property. The doctrine of remedial legislation should not be stretched to expand the reach of a statute of such evident limited purposes as 25 U.S.C. § 465. *Cf. United States* v. *Zacks,* 375 U.S. 59, 84 S.Ct. 178, 11 L.Ed.2d 128 (1963).

3. The United States argues that the compensating tax should not be imposed on Petitioner's use of tangible personal property and relies on *United States* v. *Rickert,* 188 U.S. 432, 28 S.Ct. 478, 47 L.Ed. 532 (1903). The *Rickert* case concerned a tax on tangible personal

property, not a compensating or use tax. A tax upon the use of property is not a tax upon the property itself. See *United States* v. *City of Detroit, supra; Agua Caliente Band of Mission Indians* v. *County of Riverside,* 442 F.2d 1184 (9th Cir. 1971), U.S. cert. denied February 22, 1972. The primary purpose of the compensating tax at issue here was ". . . to protect, so far as is practicable, the merchants, dealers and manufacturers of New Mexico who operate under the excise tax laws of this state, and who meet the requirements of such laws, against the unfair competitions of importations into New Mexico, without the payment of a sales tax, of goods, wares and merchandise." The New Mexico Laws of 1939, ch. 95, § 1 [§ 72-17-2, N.M.S.A. 1953, repealed July 1, 1967].

The tangible personal property purchased by Petitioner was purchased with money loaned to Petitioner by the United States. (Memorandum Brief, Appendix 13) It was not issued by the United States to an allottee as in the *Rickert* case; and it was not, in fact, the property of the United States at the time the compensating tax was assessed on its use.

Respondent contends the exemption provided by 25 U.S.C. § 465 has no application to the compensating tax at issue here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-738

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Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

RESPONSE OF PETITIONER TO THE MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The Petitioner submits this Memorandum pursuant to a request by the Court to respond to the Memorandum for the United States as Amicus Curiae.

Argument

The concern expressed by the United States as Amicus Curiae is the same as that of the Petitioner - that state taxation of an Indian tribe on the revenues produced by the use of tax exempt tribally held lands is detrimental to the economic well-being of the Indian tribe and jeopardizes federal programs encouraging Indian economic development. The decision of the New Mexico Court of Appeals authorizes the state to tax such tribal interests, contrary to federal programs, regulations and statutes.

1. Both the Enabling Act, June 20, 1910, 36 Stat. 557, Ch. 310, Sec. 2 Cl. 2, and 25 U.S.C. 465 are federal statutes enacted to immunize tribal land lands from the action of the state. To protect the tribes, these statutes exempt tribal lands from state taxation, leaving the change of such a status in the hands of Congress. A review of the Indian Reorganization Act of 1934 indicates a federal control over Indian activities and an expressed policy of fostering Indian economic development.

The stipulation of facts in the present case (T. 5-9) shows tribal economic development under the watchful eye of the federal government. The tribe did not enter this economic enterprise until the Bureau of Indian Affairs had conducted a feasibility study; such federal assistance and control has continued throughout the development of this tribal enterprise.

Stephens v. Commissioner of Revenue, No. 28193, 10th C. A. 9, decided November 30, 1971, is illustrative of the protection 25 U.S.C. 465 affords Indians. That case involved federal income tax, but reiterates that the exemptions of 25 U.S.C. 465 apply to lands acquired pursuant to the Indian Reorganization Act. In the present case, funds available under 25 U.S.C. 470 are specifically referred to in 25 U.S.C. 465 and are applicable to tribes organized under 25 U.S.C. 476. As indicated in the *Stephens* case, statutes and regulations dealing with Indians must be read in *pari materia*.

The position of the United States reiterates the stand of Petitioner in that existing federal regulations and statutes have blocked the state from applying its taxes to Indian held lands.

2. The Petitioner feels the 25 U.S.C. 465 exemption applies to the taxation of the proceeds derived from the use of the ski area for the economic benefit of the tribe. 25 U.S.C. 465 does not say specific state taxes but seems all inclusive in stating "... and such lands or rights shall be exempt from state and local taxation." Further, the language and intent of 465 is to any interests in lands and does not limit it to "ownership". Petitioner would suggest the broad scope of 465 is to open the door for various types of economic development, not limiting these as to use or location. The factor to be considered is whether such economic development is for the benefit of the tribe.

Such a policy places the burden on the state to show how its tax can be applied to a tribal activity protected by federal statutes. *Squire v. Capoeman*, 351 U.S. 1; *United States v. Rickert*, 188 U.S. 432; *Stephens v. Commissioner of Revenue*, supra.

2. *United States v. Rickert*, supra., indicates that the federal exemption applies to the imposition in the present case of the New Mexico Use Tax, Section 72-17-3, N.M.S.A., 1953 Comp. Again, the state is precluded because such a tax would interfere with established federal Indian policies of economic development through federal controls. The facts in the present case show the federal government has been involved in each step of the ski resort's development, all to the exclusion of the State of New Mexico.

Conclusion

The Amicus Curiae Memorandum of the United States endorses the propositions presented in the Petition for a Writ of Certiorari, and is another expression of federal concern for the economic development of Indian tribes. Petitioner and other tribes are on the road to economic self-sufficiency, but have a long way to go in reaching that goal. That goal can only be reached through continued federal assistance as outlined in the Indian Reorganization Act of 1934, and controls that exempt the state from endangering this effort.

Respectfully submitted,
FETTINGER & BURROUGHS

By F. Randolph Burroughs
Counsel for Petitioner

March, 1972

IN THE

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OCTOBER TERM, 1971

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v.

FRANKLIN JONES, Commissioner of the Bureau of Revenue of the State of New Mexico, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, *Respondents*.

BRIEF OF NATIVE AMERICAN RIGHTS FUND
AS AMICUS CURIAE IN SUPPORT OF
THE PETITIONER

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BRIEF OF NATIVE AMERICAN RIGHTS FUND AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

INTEREST OF NATIVE AMERICAN RIGHTS FUND AS AMICUS CURIAE

Petitioner and Respondents have filed with the Clerk of this Court a written stipulation consenting to the filing of this brief. *Amicus* has a considerable interest in the outcome of this case and is particularly qualified in the specialized area of Indian law.

Native American Rights Fund (hereinafter referred to as the "Fund") is a private, nonprofit corporation organized for the purpose of and dedicated to protecting the rights and enhancing the general welfare of American Indians and providing legal representation and counsel in cases of major significance to Indians. Because of the Fund's expertise on Indian law, the Fund also provides counsel to legal services programs on Indian legal matters under a contract with the Office of Economic Opportunity. The Fund participates as *amicus curiae* in this case because of the impact the decision in this case will have on the present and future economic development of Indian tribes throughout the country.

STATEMENT

The Petitioner in this case is the Mescalero Apache Tribe. In 1852 the United States carved out of the Tribe's aboriginal homelands a reservation, and by treaty, the Tribe accepted the reservation, and ceded to the United States the remainder of its traditional lands. The reservation is now contained in Lincoln and Otero Counties of the State of New Mexico.

On June 18, 1934 Congress passed the Wheeler-Howard Act (48 Stat. 984, 25 U.S.C. 461, *et seq.*). Pursuant to this Act, specifically 25 U.S.C. § 476 the Tribe adopted a constitution in 1936 and was issued a corporate charter by the United States under 25 U.S.C. § 477. As required by 25 U.S.C. § 476, the Tribal constitution and amendments thereto have been approved by the Secretary of Interior. The Tribe continues to operate as a governmental body under this constitution and charter.

Over the last several years the Mescalero Apache Tribe has attempted to develop the reservation and lands near the reservation for the economic betterment of all members of the Tribe. As a part of this economic development, the Tribe leased from the United States Forest Service 80 acres of national forest lands bordering in part on the Tribe's reservation. On this land the Tribe owns and operates a ski resort, the Sierra Blanca Ski Enterprises. Some of the resort's cross-country ski trails are located on the reservation, but no part of the buildings or other equipment used at the ski resort is located within the now existing boundaries of the Tribe's reservation.

The involvement of the United States in this Tribal operation has been continuous and supportive. First a feasibility study was made and financed by the Bureau of Indian Affairs of the Department of Interior. The rental under the lease, the price of the equipment and the construction of the resort were all financed with money loaned to the Tribe by the United States under the authority of 25 U.S.C. § 470. Pursuant to the expansive regulations applicable to 25 U.S.C. § 470 loans, contained in 25 C.F.R. Part 91, approval of the Bureau of Indian Affairs is required in several areas of the operation of the ski resort. For example, the approval of this Bureau must be obtained on:

a. The budget for each fiscal year.

b. The leasing of equipment or other property for use by the Tribe.

c. The leasing of facilities at the ski resort to concessionaires.

d. The plans and designs for the construction of any additional facilities or improvements.

e. The disposal of all property other than expendable items.

f. The form and contents of monthly interim reports and accounting records of the operation.

g. The form and contents of an annual audit which is to be conducted, and the licensed public accountant or firm of public accountants who will conduct the annual audit.

The revenue generated by this ski resort is used and will continue to be used for the educational, social and economic welfare of the Mescalero Apache people. The ski resort also provides a job training center for the Tribe and approximately 20 to 30 Tribal members are employed at the ski resort in a job training capacity.

In May, 1968 the Bureau of Revenue of the State of New Mexico audited the ski resort. As a result of this audit, the State of New Mexico assessed the Tribe for a tax on its storage, use or other consumption in New Mexico of the materials owned by the Tribe and used to construct two ski lifts at the resort, pursuant to § 72-17-3 N.M.S.A. 1953 Comp. These materials for which the Tribe was assessed had all been purchased from the funds supplied to the Tribe by the United States pursuant to 25 U.S.C. § 470. The Tribe protested this assessment.

The Tribe reported and paid to the New Mexico Bureau of Revenue a tax on the gross receipts of its ski resort enterprise pursuant to the provisions of the Emergency School Tax Act, as amended, §§ 72-16-1 through 72-16-47 N.M.S.A. 1953 Comp. Subsequent to payment the Tribe filed a claim with the Respondent for a refund of this gross receipts tax.

The protest and claim for refund were denied by a Decision and Order of the Commissioner of the Bureau of Revenue, Respondent, dated December 23, 1970. The matter was appealed to the Court of Appeals of the State of New Mexico. On August 6, 1971, the Court of Appeals of the State of New Mexico affirmed the decision of the Commissioner of Revenue, by a Court divided on rationale. A timely Motion for Re-Hearing was filed and an Order denying the Motion for Rehearing was entered September 7, 1971. A timely Petition for Writ of Certiorari was filed with the Supreme Court of the State of New Mexico on September 28, 1971, and an order denying the Petition for Writ of Certiorari was entered on October 6, 1971.

This Court granted Petitioner's Petition for a Writ of Certiorari on April 24, 1972.

ARGUMENT

This case presents this Court the opportunity to determine if a state, here New Mexico, can constitutionally tax an Indian Tribe, chartered by the United States and pursuing profit-making activities under the watchful eye and regulatory control of the United States, its legal trustee and guardian. The petitioner herein, the Mescalero Apache Tribe, has undertaken an economic development program to provide funds for the educational, social and further economic development of the Tribe as a whole. All of the profits generated by this particular phase of the development program, a ski resort located off the reservation, are being invested in those social services, such as education, which the federal government is bound by treaty and law to provide as a part of the trust obligation of the United States to the Mescalero Apache Indians.

Hence, a successful and profitable operation of the facilities being taxed by New Mexico immediately relieves the Federal government of some financial burdens. The United States recognized the benefits it would receive, and consequently provided technical assistance, loans, and supervision of this tribal project which the State of New Mexico is now attempting to tax.

The economic viability of the development programs now being undertaken or contemplated for the future by the Petitioner and other tribes is potentially threatened by the taxing power of the states in which the reservations are situated. This Court in 1819 first recognized in the case of *M'Culloch* v. *Maryland*[1] that the power of a state to tax a federal instrumentality is incompatible with a federal system of government. This Court in this case must decide the vitality today of this long established doctrine.

The Petitioner before this Court deviated from the economic development programs of most tribes today in that the Mescalero Apache Tribe recognized the economic potential of lands belonging to the United States and bordering its reservation. The Tribe leased these lands from the United States and constructed thereon the ski resort with money borrowed from the United States.

Amicus maintains that the nature of the relationship of the Petitioner Tribe to the United States is unaffected by where that Tribe chooses to conduct its business. Until the termination of the Federal trust responsibility of the United States to the Mescalero Apache Tribe, that Tribe will remain an instrumen-

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[1] 17 U.S. (4 Wheat.) 316, 427 (1819).

tality of the Federal government, and its activities will be sheltered from state taxation by the legal umbrella of protection which the United States Constitution affords the Federal government and its instrumentalities.

I

THE MESCALERO APACHE TRIBE IS A FEDERAL INSTRUMENTALITY AND, AS SUCH, IS EXEMPT FROM STATE TAXATION.

A. The Mescalero Apache Tribe Is a Federal Instrumentality

In 1934, Congress passed the Act of June 18, 1934,[3] commonly referred to as the Wheeler-Howard Act. The Senate committee reporting out the bill favorably stated the intent of this bill succinctly:

> (1) To stop the alienation, through action by the Government or the Indian, of such lands, belonging to ward Indians, as are needed for the present and future support of these Indians.
>
> (2) To provide for the acquisition, through purchase, of land for Indians, now landless, who are anxious and fitted to make a living on such land.
>
> (3) To stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations.
>
> (4) To permit Indian tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations.
>
> (5) To establish a system of financial credit for Indians.

[3] 48 Stat. 984, 25 U.S.C. §§ 461 *et seq.*

(6) To supply Indians with means for collegiate and technical training in the best schools.

(7) To open the way for qualified Indians to hold positions in the Federal Indian Service.[3]

Pursuant to this legislation, in 1936 the Mescalero Apache Tribe adopted a Constitution which was approved by the Secretary of Interior, pursuant to 25 U.S.C. § 476, and the Tribe commenced operation as an incorporated organization, chartered by the United States under the authority of 25 U.S.C. § 477. To be noted also, the Tribal enterprise that New Mexico is now taxing was financed by loans from the United States under 25 U.S.C. § 470, which is a provision of the Wheeler-Howard Act, designed to accomplish the 4th and 5th objective of the Act, as outlined *supra*.

Amicus contends that since the Petitioner is chartered by the United States and is pursuing activity sponsored by the United States, the Tribe is a Federal instrumentality. A recent series of decisions by this Court support this proposition. In *Federal Land Bank* v. *Bismarck Lumber Company*[4] this Court decided that a Federally chartered land bank was a Federal instrumentality and hence was exempt from a state sales tax. This Court used the following language: "When Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental."[5]

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[3] Sen. Rept. No. 1080, 73rd Congress, 2nd Session (May 10 [Calendar Day, May 22] 1934).

[4] 314 U.S. 95 (1941).

[5] 314 U.S. 95 at 102.

Even more recently, this Court has denominated a variety of entities furthering the interests of the Federal government as Federal instrumentalities for tax purposes. In *First Agricultural National Bank of Berkshire Co.* v. *State Tax Commission*[6] this Court in 1968 concluded that a national bank is a Federal instrumentality and in the absence of authorizing Congressional legislation, exempt from a state sales tax on tangible personal property purchased for the bank. See also *Standard Oil Co. of California* v. *Johnson*[7] (post exchanges on military bases are Federal instrumentalities); *Pittman* v. *Home Owners' Loan Corp.*[8] (Federally sponsored Home Owners' Loan Corporations are Federal instrumentalities).

In *Department of Employment* v. *United States*,[9] this Court deemed the Red Cross such an instrumentality, and therefore exempt from a state unemployment compensation tax. This Court noted that the Red Cross was chartered by the United States, was subject to governmental supervision and to regular financial audit by the Defense Department, that some of the officers of the Red Cross are appointed by the President, that the Red Cross is satisfying some obligations of the Federal government, and is otherwise furthering objectives of the United States.[10]

Employing the above, most recently delimited, tests set down by this Court for what constitutes a Federal

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[6] 392 U.S. 339 (1968).

[7] 316 U.S. 481 (1942).

[8] 308 U.S. 21 (1939).

[9] 385 U.S. 355 (1966).

[10] 385 U.S. 355, at 359.

instrumentality, the Petitioner is clearly such an instrumentality. The Tribe is Federally chartered and under the close scrutiny of the United States; its Constitution was approved by the United States, and all amendments thereto, as well as most Tribal lawmaking, are subject to approval by the Department of Interior. When pursuing those business activities now being taxed, the Tribe comes under further regulations because of the borrowing of funds from the United States under 25 U.S.C. § 470.[11] That the Tribe is satisfying the obligations of the United States can best be witnessed by the uses to which the Tribe is dedicating the profits of this ski resort—the economic, education and social programs designed to benefit the Tribal members, which programs the Federal government would otherwise be obligated to provide, by treaty and law, as a part of the trust obligation of the United States. Finally, this Court in 1903 recognized in *United States* v. *Rickert*[12] that economically viable Indian communities were a fundamental policy objective of the United States in carving out reservations for the various Indian tribes. In that case, this Court struck down a tax on permanent improvements made on reservation lands recognizing that these improvements were essential for the development of the Indian owners. Certainly the Federal objective of tribal economic development is no less strong today. President Nixon deemed such development a goal of his administration in the following language: "It is critically important that the Federal government support and

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[11] 25 C.F.R. Part 91.

[12] 188 U.S. 432 (1903).

encourage efforts which help Indians develop their own economic infrastructure."[13]

B. As a Federal Instrumentality, the Mescalero Apache Tribe Is Exempt From State Taxation

Without exception, this Court has held that an entity which legally is a Federal instrumentality is necessarily exempt from state taxation, unless Congress expressly directs otherwise.[14] This proposition was originally expounded in *M'Culloch* v. *Maryland*[15] as a necessary response to the notion that the power to tax is the power to destroy, and that instruments of the Federal government in a federal system could not be subject to a destructive power exercisable by a state. ". . . [S]ince 1819, when Chief Justice Marshall in the *M'Culloch* case expounded the principle that properties, functions and instrumentalities of the Federal government are immune from taxation by its constituent parts, this Court never has departed from that basic doctrine or wavered in its application."[16] In a 1968 case previously mentioned, *First Agricultural National Bank of Berkshire Co.* v. *State Tax*

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[13] "Indian Affairs", The President's Message to The Congress, 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 894, 900-01 (1970).

[14] *Amicus* does not contend that the doctrine of immunity from state taxation for entities asserting the protection of the Federal government's exemption has not undergone change since *M'Culloch* v. *Maryland* in 1819. This Court has modified and refined the criteria for qualifying as a Federal instrumentality over the years. But never has this Court allowed a state to tax an entity this Court concludes is an instrumentality without a congressional waiver of the immunity from state taxation.

[15] 17 U.S. (4 Wheat.) 316 (1819).

[16] *U.S.* v. *County of Allegheny*, 322 U.S. 174 at 176 (1944); *see* also, all cases cited in Part A, *supra*.

Commission[17] this Court struck down a state sales tax on tangible personal property purchased by a national bank because that tax was not one authorized by Congress. *Amicus* urges this Court continue the vitality of the *M'Culloch* doctrine in the instant case, since exactly the fears which moved Mr. Justice Marshall in *M'Culloch* are compelling in this case. The benefits which the Mescalero Apache Tribe, a federal instrumentality, may gain from its ski resort enterprise will decrease or disappear entirely if the State of New Mexico is allowed to assess the taxes against the Tribe which are herein challenged.

II

THE NEW MEXICO ENABLING ACT DOES NOT PERMIT NEW MEXICO TO LEVY TAXES AGAINST THE MESCALERO APACHE TRIBE.

The New Mexico Enabling Act,[18] Section 2, Second Clause, prohibits the state from taxing "lands or property" belonging to the United States or hereafter "acquired by the United States or reserved for its use." The Act further provides that nothing therein "shall preclude the said state from taxing, as other lands and other property are taxed, any land and other property outside of an Indian Reservation owned or held by any Indian save and except such lands . . . as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as Congress has prescribed or may hereafter prescribe."[19]

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[17] 392 U.S. 339 (1968).

[18] 36 Stat. 557 (1910).

[19] 36 Stat. 557, 558-559.

As stated *supra*, the enterprise being taxed by New Mexico is not situated on the Mescalero Apache Reservation. Respondent would have this Court interpret the above quoted sections of the New Mexico Enabling Act as allowing the taxes in question herein. *Amicus* contends that such a reading is incorrect for the following reasons:

First, the Enabling Act prohibits the taxation of lands or property "acquired by the United States or reserved for its use." If this Court concludes that the Mescalero Apache Tribe is a Federal instrumentality, as *Amicus* argues, then all of the property owned by the Tribe without the boundaries of the reservation are reserved for the use of the United States. To be a Federal instrumentality is to stand in the shoes of the United States.

Secondly, the Enabling Act does give the State of New Mexico the power to tax lands and other property owned by "any Indian or Indians" outside the reservations. Noticeably absent is the power to tax lands or property not located on a reservation and owned by *Indian Tribes.*

Amicus suggests that the omission of Indian Tribes from the grant of taxing power to New Mexico was not inadvertent but instead supports the proposition that Indian Tribes have always been considered Federal instrumentalities by Congress, and their activity, within or without the reservation should consequently be immune from New Mexico's taxing power. The fact that the New Mexico Enabling Act (1910) predates the Act of June 18, 1934 (the Wheeler-Howard Act, 1934) does not vitiate this argument. Indian tribes had been recognized as distinct legal entities in law ever since Chief Justice Marshall, in *The Cherokee*

Nation v. *Georgia*,[30] denominated Indian tribes in the United States as "domestic dependent nations."[31] New Mexico itself in its territorial laws acknowledged Indian tribes within the territorial boundaries as corporate bodies, capable of suing or defending suits.[32] Had Congress intended to allow New Mexico to tax the property and activities of Indian tribes, such as the Petitioner, located without the reservation, Congress could have specifically referred to Indian tribes when authorizing New Mexico to tax "lands or property outside of an Indian reservation owned or held by any Indian." By not so referring to Indian tribes, Congress intended that their activity, within or without the reservation, should not be taxed.

III

25 U.S.C. § 465 PRECLUDES NEW MEXICO FROM TAXING PROPERTY OR ENTERPRISES OWNED BY THE MESCALERO APACHE TRIBE AND SITUATED ON LANDS LEASED WITH FUNDS PROVIDED UNDER 25 U.S.C. § 470.

25 U.S.C. § 465 states that: "Title to any land or rights acquired pursuant to sections . . . 465, 466-470 . . . of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such land or rights shall be exempt from state and local taxation." *Amicus* argues that because the Tribe leased the land on which the ski resort is located from the United States Forest Service with money provided pursuant to 25 U.S.C. § 470, New Mexico may not tax in any

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[30] 30 U.S. (5 Peters) 1 (1831).

[31] 30 U.S. (5 Peters) 1 at 16.

[32] New Mexico Laws 1851-1852, pp. 176, 418; *cf. Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919).

way property purchased by the Tribe with a 25 U.S.C. § 470 loan and located on these leased lands.

Certainly, New Mexico could not assess a property tax on the leased lands because of the specific exclusion in 25 U.S.C. § 465 for lands or rights acquired pursuant to 25 U.S.C. § 470. But because Congress provided no specific exclusion for permanent improvements owned by Tribes and located on leased lands, the inference might be drawn that New Mexico may tax such property. Such an inference would be incorrect because when 25 U.S.C. §§ 465 and 470 were enacted in 1934 as part of the Act of June 18, 1934[23] (the Wheeler-Howard Act), the operative case law established a tax exemption for any and all property located on tax exempt reservation land. In *United States* v. *Rickert*[24] this Court in 1903 struck down a tax levied by South Dakota on the permanent improvements owned by Indians and located on tax exempt land. This Court stated that "[e]very reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements."[25] The above quoted reasoning in *Rickert* is particularly compelling when the permanent improvements being taxed were bought with money loaned by the United States specifically for the economic development of the Tribe. *Amicus* suggests that Congress, in passing the Wheeler-Howard Act in 1934, legislated into the well-established case law represented by *U. S.* v. *Rickert* that permanent improvements owned by Indians and located on tax exempt lands were not taxable.

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[23] 48 Stat. 984; 25 U.S.C. §§ 461 *et seq.*

[24] 188 U.S. 432 (1903).

[25] 188 U.S. 432 at 442.

CONCLUSION

For the above reasons, *Amicus,* Native American Rights Fund, urges this Court to reverse the decision rendered against the Petitioner by the Court of Appeals of the State of New Mexico. We urge this Court find that the Petitioner, Mescalero Apache Tribe, is a Federal instrumentality and therefore that its activities are protected from the taxes assessed against it by the State of New Mexico. Such a finding comports with the language and intent of the New Mexico Enabling Act and is supported by 25 U.S.C. §§ 465, 470.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-738

THE MESCALERO APACHE TRIBE,

Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF OF THE PETITIONER

Opinion Below

The Opinion of the Court of Appeals of the State of New Mexico is reported in 83 N.M. 158, 489 P. 2d [illegible] (Ct. App. 1971) (App. 62).

Jurisdiction

The Mescalero Apache Tribe is engaged in a business enterprise, a ski resort, which by necessity is located primarily on United States lands adjacent to the Mescalero Apache Reservation. The State of New Mexico sought to tax: (1) The use of tangible personal property owned by the Tribe and used in this business, which is wholly owned and operated by the Mes-

calero Apache Tribe; (2) the gross receipts of the Tribal enterprise, a privilege tax, on the privilege of doing business in New Mexico. The compensating tax was imposed pursuant to Section 72-17-3, N.M.S.A. 1953 Comp., and the gross receipts tax was assessed under the Emergency School Tax Act as amended, being Sections 72-16-1 through 72-16-47, N.M.S.A. 1953 Comp.

A timely Claim for Refund and Protest of Assessment was filed with the Commissioner of the Bureau of Revenue of the State of New Mexico in Santa Fe, New Mexico by the Mescalero Apache Tribe. The Protest and Claim for Refund were denied by the Commissioner of the Bureau of Revenue on the 23rd day of December, 1970, holding that the Tribal interests were taxable. The matter was appealed to the Court of Appeals of the State of New Mexico pursuant to Sections 16-7-8 (F) and 72-13-39 N.M.S.A., 1953 Comp. On August 6, 1971, the Court of Appeals of the State of New Mexico affirmed the decision of the Commissioner of the Bureau of Revenue, by a Court divided on rationale. A timely Motion for Re-hearing was filed and an Order denying the Motion for Re-hearing was entered September 7, 1971. A timely Petition for Writ of Certiorari was filed with the Supreme Court of the State of New Mexico on September 23, 1971 and an Order Denying the Petition for Writ of Certiorari was entered on October 6, 1971. This was the final order entered in this cause by the New Mexico appellate courts. The jurisdiction of this Court rests in 28 U.S.C. 1257(3).

Questions Presented

1. Can the State of New Mexico, acting under state law, validly impose a tax upon the use of tangible personal property owned by an Indian tribe and utilized in a Tribal operated enterprise, where said Tribe has a treaty with the federal government, is governmentally structured pursuant to the Indian Reorganization Act, and has established the enterprise pursuant to federal statutes for Indian economic development?

2. Can the State of New Mexico, acting under state law, validly impose its gross receipts tax, a privilege tax, upon an Indian tribe operated enterprise, where said Tribe has a treaty with the federal government, is governmentally structured pursuant to the Indian Reorganization Act, and has established the enterprise pursuant to federal statutes for Indian economic development?

Constitutional Provisions, Statutes and Regulations Involved

The relevant Constitutional provisions, statutes, treaty and regulations are as follows:

1. The U.S. Const. Art. I, Sec. 8, Cl. 3:

"The Congress shall have power . . . to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

2. The Treaty of July 1, 1852, 19 Stat. 979, between the United States of America and the Mescalero Apache Tribe. The Treaty is contained in the Appendix (page 9).

3. 25 U.S.C. 465:

"The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allotee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 466, 470, 471-473, 474, 475, 476-478, and 479 of this title shall be taken in the name of the United States in trust

for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. 470:

"There is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $20,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established.

The Enabling Act For New Mexico, Ch. 310, § 2, § 2, 36 Stat. 557 (1910):

"That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or by prior sovereignty, and that until the title of such Indian or Indian tribes shall have been ex-

tinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein or in the ordinance herein provided for, shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian Reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of congress, but said ordinance shall be exempt from taxation by said state so long and to such extent as congress has prescribe or may hereafter prescribe.

6. The other statutes and regulations are too long for reproduction in this portion of the brief and are attached as Appendix A of this brief.

Statement

The Petitioner in this case is the Mescalero Apache Tribe, an Indian Tribe organized under the Indian Reorganization Act. The Petitioner entered into a treaty with the United States of America in 1852. The Mes-

[illegible] Indian Reservation, where the Mescalero Apache Tribe resides, is comprised of a small part of the Tribe's aboriginal homelands. Pursuant to 25 [illegible], the Mescalero Apache Tribe in 1936 adopted a Constitution, revised January 12, 1965 (App. 13), and has continued to be a viable, functioning Indian tribe performing governmental functions under that Constitution, tribal ordinances and applicable federal [illegible].

Over the years the Mescalero Apaches have attempted to develop the reservation and lands near the reservation for the economic betterment of all members of the tribe. In furtherance of the tribe's [illegible] for economic independence and to improve the general well-being of the tribe, the tribe developed a ski resort located in Otero and Lincoln Counties, New Mexico. The name of this resort is Sierra Blanca Ski [illegible] and it is exclusively owned and operated by the Mescalero Apache Tribe. The ski resort is on [illegible] belonging to the United States Forest Service; [illegible] lands have been leased to the tribe for a period of thirty years. The ski resort area is bordered on the [illegible] by the Mescalero Reservation with some of the cross-country ski trails actually located on the reservation; however, the majority of the ski facility is located on the federally leased lands.

The lease with the United States Forest Service was executed by the Tribe pursuant to Article XI, Section 1 of the Tribe's Constitution (App. 19-20). Even though these leased lands are located outside the physical boundaries of the reservation, the facilities at [illegible] are under federal control through the De-

partment of the Interior the same as any facility located within the actual boundaries of the reservation. The basic purpose of the ski resort is to provide revenue for the tribe in lieu of raising revenue through the taxation of tribal members or in some other endeavor. The revenue from the ski resort is being used for the educational, social and economic welfare of the Mescalero Apache Tribe. The ski area also provides a job training center for the Mescalero Apache people and approximately twenty to thirty tribal members are employed at the ski resort in a job training capacity (App. 3-4).

After a feasibility study by the federal government, the Tribe secured financing from the federal government under 25 U.S.C. 470.

In May of 1968, after improvements had been made and the ski resort was in operation, the Bureau of Revenue of the State of New Mexico conducted an audit. All of the materials against which the tax was assessed were purchased with money borrowed by the Tribe from the federal government pursuant to 25 U.S.C. 470, and the purchase of all such materials were subject to and approved by the Bureau of Indian Affairs, all as outlined in 25 C.F.R. pt. 91. Not only were the materials purchased with money borrowed by the Tribe from the federal government, but also the plans and specifications for the construction of the ski lift at the ski resort were approved by the federal government (App. 3-6).

As a result of such assessment, a written protest was timely filed by the Tribe as required by Section

[illegible] of the Tax Administration Act for the State of New Mexico. The procedures as outlined in the [illegible] statement above were then followed. The [illegible] stipulated by both parties at the time of [illegible] before the Commissioner of Revenue, and [illegible] stipulated facts have governed this case at each step of the appellate process (App. (2-5).

This economic enterprise was a further step by the progressive tribe to become self-reliant and to [illegible] federal Indian policy of nurturing Indian resources so that they lead to economic independence and self-development. This purpose was admitted by the state in this very enterprise (App. 3-4). The tax by the Bureau of the State of New Mexico not only challenges this self-reliance, but flaunts the very existence of the Petitioner as a body politic - a sovereign Indian tribe under the control of the federal government. By imposing the taxes in this case, the state is saying it can assert control over the Petitioner. For years the Petitioner struggled to grow with the assistance of the federal government. The federal government has responded with legislation, [illegible] and Bureau of Indian Affairs control to [illegible] that this economic development was not impaired.

It should be noted that New Mexico is not a "Public Law 280" state. The state has not attempted to undertake the duties and responsibilities for these Indians, [illegible] it expects to extend its taxing power over their economic efforts.

[illegible] property was not subject to state taxation [illegible] the house and plow were utilized for economic

development. The means have changed, such as the ski enterprise in this case, but the purpose is unchanged. The ski resort is furthering the national policy of aiding the Indians' economic development. It is natural for the Indian tribe to turn to the federal government in development of these enterprises. Under such control and concern, the tribe has turned to the federal government when seeking means of implementing plans for economic development; funds available under 25 U.S.C. 470 appeared as a natural avenue for the development of the ski area. It is through the funds available under 470 that the resort area was constructed and another leg to economic stability was added to the life of the Tribe.

In years gone by, roaming the land and using the resources of nature have been the way of life for the Mescalero Apache people; now, they are attempting to utilize these resources for tribal development in a way acceptable to the white man's civilization. As the Mescaleros have turned from roaming the land to developing the land, they have always turned to the federal government for guidelines and assistance. It would be unfair to this tribe to see a trust relationship established over one hundred years ago and nurtured by the protection of the federal government destroyed by the tax efforts of the state of New Mexico.

Summary of Argument

The State of New Mexico has attempted to tax a sovereign Indian tribe in the operation of a ski resort adjacent to the Tribe's reservation; this resort was developed through federal funding, and like other tribal

activities, is under the control and direction of the Bureau of Indian Affairs of the Department of Interior. The State of New Mexico is without authority to tax either the gross receipts or the use of tangible personal property of the ski resort for the following reasons:

A. The federal government has complete control over the Petitioner through the powers established in the Commerce Clause, U.S. Const. Art. I, Sec. 8, cl. 3 and the Treaty of 1852. This power has been implemented by federal legislation that indicates continued concern and control for Indian tribes by the national government. It is such legislation, and specifically that legislation dealing with economic development, that assisted the tribe in developing the ski resort. 25 U.S.C. 470. Such active participation by the federal government has precluded the state from any control. 25 U.S.C. 465 specifically removes any question of state action in the tax area by stating that interests acquired under 25 U.S.C. 470 shall be taken by the United States in trust for the tribe and shall be exempt from state taxation.

The State of New Mexico relinquished any authority over Indian held interests when it entered the union. The New Mexico Enabling Act has been interpreted by this Court in *United States v. Sandoval*, 231 U.S. 28 (1913), which acknowledges broad federal control over Indian tribes; it further states that for New Mexico to gain control over Indian tribes, it must do only specific authorization from Congress.

The problem of continued responsibility has been developed over the years by the federal government and

has left no room for tax action by the State of New Mexico.

B. The action of the state interferes with the Tribe's right to self-government. The Tribe is seeking stability through economic development of its land resources on and near the reservation. Such development means continuity of tribal integrity and customs while assuring the tribal sovereignty.

Federal protection of tribal sovereignty was developed in *Worcester v. Georgia*, 31 U. S. (6 Pet.) 515, 8 L.Ed. 483 (1832), and has been carried down to the present time. Such a doctrine of tribal sovereignty has given the tribes independence from state government and is consistent with the guardian-ward relationship which developed between the tribes and the federal government as a result of the federal government's assumption of responsibility for the Indians. Due to this guardian-ward relationship, the tribe relied substantially on the federal government for assistance and has made few claims upon the states; it seems incongruous that a state would have taxing power over an Indian tribe when its other contacts with such tribe are minimal.

The Mescalero Apache Tribe has developed as an independent, viable community in which the laws of the State have no force and effect. *Williams v. Lee*, 358 U. S. 217, 219, 3 L.Ed.2d 251 (1959). *Williams* not only holds that the state law may not be applied where it interferes with a tribe's right to self-government, but also lays down a very narrow area in which tribal relationships were considered not to be jeopar-

[illegible] by action. See 358 U. S. at 220-221, 3 L.Ed.2d at [illegible]. The present case does not fall within any of these narrow exceptions. In fact, no greater threat to [illegible] government can be imagined than the allowance [illegible] one sovereign to tax another. The power to tax is the power to destroy rationale of *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, 427, 4 L.Ed. 579 (1819), has been applied to Indian tribes in *United States v. Rickert*, 188 U. S. 432, (1903).

The Tribe's sovereignty, under federal control and guidance, precludes the state from imposing taxes that interfere with that sovereignty.

C. The Tribe is a federal instrumentality. *Federal Indian Law* at pp. 472-473, states that an Indian tribe is an instrumentality of the federal government; this has been stated by this Court in *United States v. Rickert*, 188 U.S. 432, 437-438 (1903).

Under the guardian-ward relationship between the federal government and the tribe some agency or bureau of the government must be utilized in working with the Indians, this has normally been the Bureau of Indian Affairs. The state would not be able to tax the Bureau of Indian Affairs in assisting the economic growth of the tribe, and it must logically follow that when the instrument becomes the tribe itself, the insulation from state taxation remains.

In conclusion, all of the foregoing arguments of the Petitioner indicate a federal policy fostering economic development of the American Indian. Such a policy implemented by specific federal legislation and

holdings of this Court, removes any tax authority of the State of New Mexico to tax this sovereign Indian Tribe. Such a tax would lead to the eventual destruction of the tribal entity, thereby destroying efforts to improve the way of life of these first Americans.

Argument

I

THE STATE OF NEW MEXICO HAS NO AUTHORITY TO TAX THE MESCALERO APACHE TRIBE BECAUSE THE FEDERAL GOVERNMENT HAS EXCLUSIVE JURISDICTION OVER THE TRIBE.

The Tribe contends that the State of New Mexico has no authority to tax because exclusive jurisdiction over the Tribe is vested in the federal government and such taxation is inconsistent with the Treaty of 1852 and specific federal legislation.

The decision below conflicts with the Commerce Clause of the Constitution and the Petitioner's Treaty, both granting exclusive jurisdiction over the Petitioner to the federal government. The Treaty of July 1, 1852, 10 Stat. 979 (App. 9), establishes the first organized control of the Petitioner by the federal government; it installs rules under which the Tribe will exist and establishes the initial trust relationship between the Tribe and the national government.

The United States has controlled Indian relations through the powers established in the Commerce Clause, U.S. Const. Art. I, Sec. 8, cl. 3, which provides that Congress shall regulate commerce with the In-

these tribes. It is this regulatory power that was exercised for years to preempt state control of liquor sales to Indians, without restriction as to location. *United States v. Holliday*, 70 U.S. (3 Wall) 407, 417-418 (1866); *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876). Cohen, *Handbook of Federal Indian Law*, p. 91 states: "The power of Congress to regulate commerce with the Indian tribes has for its field of action the entire nation, not just the Indian country." This Commerce Clause power has been exercised down to the present date. *Warren Trading Post v. The Arizona Tax Commission*, 380 U.S. 685, 692 n. 18 (1965). Just as Congress previously extended federal control over liquor outside the boundaries of the reservation to protect its wards whenever the interest of trade and commerce required it, Congress has now extended its control to Indian economic activities outside the reservation to benefit its Indian wards.

Under the Commerce Clause and implementing statutes and regulations, the federal government has established a policy of economic development and protection of Indian tribes. The purpose of this policy is the establishment of an economic base for the Indians; such a base offers job opportunities, a better living standard and community stability. This allows preservation of Indian culture and tradition, while advancing the Indians toward commercial maturity. An important characteristic of this policy is profitability of tribal developed enterprises, and the measure

[illegible] F. Cohen, *Handbook of Federal Indian Law*, University of New Mexico Press (1942); reprinted by the U.S. Department of the Interior, *Federal Indian Law* (1958). Hereinafter, *Handbook of Federal Indian Law* cited as *Cohen* and the revision as *Federal Indian Law*.

of success for this policy is the degree of economic betterment to the Indian. Under such a policy a state tax would directly interfere with the federal scheme.

Whether the enterprise is located on or off tribal land is not the criteria to determine if the state may tax the Tribe. The relevant factors are whether the enterprise is under federal control and regulation and is meeting the goals of federal Indian policy. The statutes and regulations indicated throughout this brief show that the conduct, the control and implementation of this enterprise is under the direction of the Department of the Interior. The purpose is economic development and cultural stability. The purpose and control place this enterprise under the guidance of the federal government, all to the exemption of the state. Such purpose in effect makes the location of the enterprise only incidental. See Cohen, p.262; *Federal Indian Law*, p. 864.

The policy of protecting the status of Indian tribes is being implemented on the leased property as it is on property physically located within the tribal boundaries. The use of this property for gainful purposes allows Indian competency and self-development to continue. *Squire v. Capoeman*, 351 U.S. 1 (1956). Even the actual use is consistent with federal Indian policies as it gives the tribe a source of revenue that benefits the members of the tribe and establishes a training ground in which tribal members can develop commercial skills (App. 3-4). The ski resort has become the tool used by the federal government to provide financial aid to the tribe.

Turning the issue around, it can readily be seen

that the existence of the ski resort, whether on federal land leased to the Indians or upon reservation lands, creates no added burdens for the State of New Mexico.

It should be noted that New Mexico is not a "Public Law 280" state. When Congress offered New Mexico the opportunity to take Indian tribes under state control, with incumbent duties and responsibilities, the state failed to step forward and assume dominion. See Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. 1162 and 28 U.S.C. 1360. Instead, the duties and responsibilities for this enterprise have continued to rest on the shoulders of the federal government. It appears to be incongruous that the State of New Mexico would have taxing power over this ski enterprise, when it has had no responsibilities or duties relative to the building and operation of the ski resort.

Federal Indian policy is implemented by specific statutes and regulations relating to Indians. The Tribe acquired and operates the ski resort with funds secured under 25 U.S.C. 470 and regulated by 25 C.F.R. pt. 91. Such federal enactments place programs of Indian development in the realm of reality. The purpose of 25 U.S.C. 470, with an exemption from state taxes being provided by 25 U.S.C. 465, is to allow economic development for the benefit of Indian tribes. For that purpose, it is of no consequence whether the land in question was reservation land, or land committed by the government to tribal economic development.

The far-reaching effects of 25 U.S.C. 470 have recently been interpreted by the Ninth Circuit in

Stevens v. Commissioner of Internal Revenue, [illegible] F.2d 741 (C.A. 9th, 1971). It should be noted that in the Stevens case the property from which the income was derived had been received by allotment, gift and purchase. These lands were deemed to be held in trust by the United States of America for the individual Indian and the derived income is exempt from federal income taxation. If federal income taxes do not apply to income created from lands secured under 25 U.S.C. 470, how can the State of New Mexico apply its taxes to the efforts of a whole tribe being utilized for the betterment of its members? Petitioner would suggest that the use of 470 funds in the present case creates even stronger exemptions from taxation because the economic development is for the whole tribe and creates job opportunities for many members of the tribe (App. 3-4).

Another case indicates the broad federal control of Indian held lands and the limitation on the states in exercising any type of control over such lands. *Gray v. United States*, 261 U.S. 219, 228 (1923), involves an individual Indian and a question of whether certain lands are reserved even though held outside a reservation. The Court declares that a state disclaims any land "... owned or *held* by *any Indian* or Indian Tribes." (Emphasis by the Court).

The leased land upon which this enterprise is located was acquired pursuant to Art. XI, Sec. 1 of the Pueblo's Constitution (App. 19-20). This leased land is performing a function of the trust interest since its use is approved by the Secretary of the Interior and is utilized for the economic well-being and

social and economic improvement of the tribe. The petitioner suggests these leased lands have the same status as trust lands since utilized pursuant to the tribal Constitution and under economic development statutes of the federal government. 25 U.S.C. 465 refers to this interest as one held in trust by the United States for the Indian tribe. This theory further implements federal Indian policy by securing economic growth and preserving Indian culture. Again, the basic purpose of any tax exemption is to enable the land preserved for the use of the tribe to serve as a tax-free base for economic growth. Its location should not affect its exempt status.

Congress has drawn no distinction between interests on the reservation and those off when implementing its policy of economic development. 25 U.S.C. 465 allows the Secretary of the Interior to secure any surface rights or interests, ". . .within or without existing reservations, . . ." . The tax exemptions of 25 U.S.C. 465 apply whether the interest is on tribal lands or lands on which the tribe has an interest. In either instance, the lands are protected under federal Indian policies for economic development and economic self-sufficiency. See also, 25 U.S.C. 1322 (b) and 25 C.F.R. 11.14.

Federal Indian policy was specifically applied to New Mexico when New Mexico joined the Union. The Enabling Act for New Mexico, ch. 310, § 2, cl.2, 36 Stat. [illegible] (1910), provides that new lands may be acquired for Indians under ". . . any act of Congress, but such Congress shall provide that all such lands shall be exempt from taxation by said state so long and to such

sent as Congress has prescribed or may hereafter prescribe." The New Mexico Enabling Act complements 25 U.S.C. 465 and exempts tribally held lands from state taxation. *United States v. Rickert*, 188 U.S. 432 (1903), interpreted the South Dakota Enabling Act when the State of South Dakota attempted to tax personal property interests of Indians; that act is similar to the New Mexico Enabling Act. Petitioner suggests its situation is a present day counterpart to the tax issues dealing with personal property taxation raised by *Rickert*. This Court said at 188 U.S. 432, 441 and 443:

> "It is true that the statutes of South Dakota, for the purposes of taxation, classify 'all improvements made by persons upon lands held by them under the laws of the United States' as personal property. But that classification cannot apply to permanent improvements upon lands allotted to and occupied by Indians, the title to which remains with the United States, the occupants still being wards of the nation, and as such under its complete authority and protection. The fact remains that the improvements here in question are essentially a part of the lands, and their use by the Indians is necessary to effectuate the policy of the United States."

and

> "The personal property in question was purchased with the money of the government, and was furnished to the Indians in order to maintain them on the land allotted during the period

of the trust estate and induce them to adopt the habits of civilized life. It was, in fact, the property of the United States, and was put into the hands of the Indians to be used in execution of the purpose of the government in reference to them. The assessment and taxation of the personal property would necessarily have the effect to defeat that purpose."

The New Mexico Supreme Court in *Your Food Stores, Inc. v. Village of Espanola*, 68 N.M. 327, 330, 361 P.2d 950 (1961), not only acknowledges the tax exemption of the Enabling Act, but also states that the State of New Mexico has no jurisdiction over Indian held lands unless such jurisdiction is specifically granted by Congress. This Court in *United States v. Sandoval*, 231 U.S. 28 (1913) and *United States v. Chavez*, 290 U.S. 357 (1933), interpreted the New Mexico Enabling Act. Those cases again declared that the New Mexico Enabling Act reiterates federal control over the Indian tribes and denies the State of New Mexico jurisdiction. The Enabling Act serves as a further limitation on the State of New Mexico and its relationship with sovereign Indian tribes, and complements other federal statutes which specifically exempt Indian held interests from state taxation.

Congress has taken very positive steps to assist the Indian tribes in achieving economic maturity and only the Congress can alter that federal Indian policy. *United States v. Daney*, 370 F.2d 791, 795 (C.A. 10th, 1966). Such a continued, close contact between the federal government and the Indian tribes, has specifically shown that the state has no authority to

tax the economic activities of the Mescalero Apache Tribe.

From the foregoing authorities, and as a result of legislation and federal policy, it can be seen that the federal government has preempted the field of economic control over Indian tribes. This is a fragile and important control, because one of the important aspects of this policy is that the tribe be able to establish independence and self-reliance by making a profit on this enterprise. To do this, Congress has taken very positive steps to remove any vestiges of state control over Indian economic efforts. In the present case, it is obvious from the statute creating the economic fund, through regulations implementing the use of these funds, and through controls as indicated in the Stipulation of Facts (App. 2-8), that the federal government is vitally interested in the economic well-being of the Tribe and intends to regulate and protect the Tribe's economic growth.

It has been the goal of various acts passed by Congress to aid the Indians in economic development; these have included the establishment of the Bureau of Indian Affairs, the establishment of reservations and the allotment system. In each case, the result has been federal preemption of the state. In the present case, Congress has changed the device to one of federal funding of economic projects, but has not changed the exempt status of the endeavor.

In *Warren Trading Post v. The Arizona Tax Comm.*, 380 U.S. 685 (1965), this Court precluded the state from taxing the business of an Indian trader licensed

by the federal government. The amount of legislation concerning regulation of Indian traders is an insignificant portion of the volume of federal legislation pertaining to Indians. A review of the Stipulation of Facts and the federal statutes and regulations presently involved, indicate far greater federal control here than that imposed on the Indian trader in *Warren Trading Post*. Where this much control exists for economic development, the state cannot interfere with that development and is therefore precluded from jeopardizing Indian progress through taxation. The proceeds derived from the tribal activity and the use of the tangible property on the ski area are beyond the taxing power of the State of New Mexico.

The State of New Mexico through its gross receipts tax and use tax is attempting to tax the privilege of engaging in this particular form of business. Such control cannot be present when federal statutes and federal Indian policy have preempted the field. Looking at the tax involved from another way, the State of New Mexico did not give the Tribe the privilege of engaging in this enterprise and cannot take it away. Based on this fact, the State of New Mexico cannot tax the enterprise. *Arenas v. United States*, 140 F. Supp. 606, 608 (1956).[2]

The State of New Mexico cannot grant or withhold from an Indian tribe the privilege of doing business, because the field of commerce with Indian tribes is completely removed from the sphere of state power by the Commerce Clause of the Constitution. The

[2] Aff'd Sub Nom. *Kirkwood v. Arenas*, 243 F. 2d 863 (C.A., 9th,

Commerce Clause gives the federal government exclusive power over commerce with the Indians no matter where the location of that commerce. The exclusive power of the federal government over commerce with Indians is not limited to Indian reservations, but extends to any transaction with Indians. A tax laid directly upon the conduct of business by an Indian tribe is contrary to federal authority, federal Indian policy and a direct impairment to commerce with Indian tribes. The Treaty and the Commerce Clause control the commercial intercourse of the tribes, with this directive implemented by federal legislation and regulations, all to the exclusion of the state.

II

THE STATE OF NEW MEXICO CANNOT TAX THE MESCALERO APACHE TRIBE BECAUSE SUCH A TAX WOULD INTERFERE WITH THE RIGHT TO SELF-GOVERNMENT.

The use tax and gross receipts tax levied by the State of New Mexico in this case are assessed directly against the Tribe. Both taxes represent a direct impairment of Petitioner's economic development by taxing the tribe's privilege of conducting business, thereby creating a direct impact on attempts at economic self-sufficiency by this Tribe. The most important impact of such a tax would be to allow the state to impose further taxes upon the Tribe and lead to the eventual destruction of the tribal entity. These direct impairments are contrary to the concept of tribal sovereignty established by the federal legis-

tion referred to in Point I and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832). Federal Indian policy is to allow economic development of the tribe for the future well-being of the tribe. The taxes being imposed by the State of New Mexico are contrary to this federal policy and have the effect of restricting Indian tribal choices of business ventures, with a further limitation as to the location of these ventures. Such restrictions thwart self-government decisions by the Tribe and limit revenue raising projects by the Tribe, all to the detriment of tribal members. State law may not be applied where it interferes with the tribe's right to self-government, *Organized Village v. Egan*, 369 U.S. 60, 67-68 (1962), and tribal sovereignty compels the exemption from state taxation of all property used for tribal purposes.

25 U.S.C. 470 states that the funds granted thereunder are for the economic advancement of the tribe. 25 U.S.C. 465 indicates a tribe is not to be interfered with in taking these steps for economic advancement. This is because tribes must establish a vehicle for continuity and for meeting the obligations of a functioning sovereign. The Constitution, By-Laws and ordinances of the Petition all point to a viable government. One of the vehicles for this self-sustaining process is through economic development, such as the ski resort. Section 470 blends with Sections 465 and 476 to insure stability and continuity of the tribe.

The acknowledgment of tribal sovereignty becomes emphatic in light of the Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. 1301 et seq., which clearly demonstrates Congressional intent to encourage tri-

bal activities, as in the present case, and thereby strengthen Indian self-government. 25 U.S.C. 1322, under that Act, specifically states that a state cannot assume jurisdiction of an Indian tribe without the consent of that tribe. See *Kennerly v. District Court of Ninth Jud. Dist. of Montana*, 400 U.S. 423 (1971).

To circumvent the tribal sovereignty doctrine, the state must be able to point to specific Congressional approval of such action. Yet just the opposite is suggested by 25 U.S.C. 465 and 25 U.S.C. 470 which specifically indicate Congress has not given the state such permission in the present case.

The power to levy a privilege tax on the gross proceeds of sales and on the use of personal property would give the state the power to control prices and property use, which could eventually lead to other controls by the state. A state may not impose its laws upon an Indian tribe when those laws interfere with the tribe's right to self-government. *Williams v Lee*, 358 U.S. 217, 219 (1959). *Williams* not only holds that state law may not be applied when it interferes with the tribe's right to self-government, but also lays down a very narrow area in which tribal relationships were considered not to be jeopardized by state action. See 358 U. S. 217, 220-221. The present case does not fall within those narrow exceptions. In fact, no greater threat to self-government can be imagined than the allowance of one sovereign to tax another. The power to tax is the power to destroy rationale of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819), has been applied to Indian tribes by *United States v. Rio-*

kert, 188 U.S. 432, 438 (1903). See *Cohen*, p. 122 and *Federal Indian Law*, p. 395.

The tribe is not striving for economic development so that it will have a proprietary gain, but is striving for economic maturity so that it can reach a level of employment, housing and prosperity for its people many Americans would consider marginal. The growth sought is not for the sake of monetary gain, but is to develop an acceptable standard of living for the Mescalero Apache people. Such is a function of the tribal government and that is the purpose of this economic endeavor. A taxing effort by the state threatens such a program, and is a direct impairment to tribal self-government.

III

THE MESCALERO APACHE TRIBE IS EXEMPT FROM NEW MEXICO TAXES BECAUSE IT IS A FEDERAL INSTRUMENTALITY.

United States v. Rickert, supra., indicates that taxing of Indian held interests is a tax on an instrumentality employed by the federal government for the benefit and control of the Indian tribe. *Cohen*, p. 275 and *Federal Indian Law* pp. 472-473, state that an Indian tribe is an instrumentality and agency of the federal government. The holding in *Rickert* and the proposition of the treatises, gain importance in light of the language of 25 U.S.C. 470 ". . .for the purpose of promoting the economic development of the tribes . . ." Section 470 sets up a means, or agency, by which the government assists the Indian tribes in

economic growth. The states have been disallowed any tax perogative over such an instrumentality promoting this economic development; 25 U.S.C. 465 disallows the state any tax perogative over such an instrumentality promoting the economic progress of a tribe.

This relationship between Congress and the Indians for economic development goes back to the terms of the Treaty itself, which establishes responsibility on the part of the federal government to protect and promote the Tribe's development. In the present case the Tribe becomes the conduit, or instrumentality, in meeting this obligation of the federal government. The plan for Sierra Blanca and all details related to its development and continuity must be approved by the national government. Its control is under the Bureau of Indian Affairs, Department of the Interior, and repayment of the loan is made to the fund which in turn is to be used by other tribes - also under the control of federal government. This is part of a circle that the government has established to meet its duties to the Indians.

Under 25 U.S.C. 470 a revolving fund was established in which repayment was to the fund itself. If these funds are taxed, this creates a delay or perhaps even a reduction in repayment and therefore places a burden on the federal government and impedes the purposes of the fund. Such a direct cause and effect relationship due to state taxation of these funds further indicates that the Petitioner is a federal instrumentality, because a tax on the tribe will directly effect the efforts of the federal government.

This recurring tax will also decrease the amount of money which the Mescalero Apache Tribe will have available to apply towards advancing the social welfare and education of its members. Ironically, the gross receipts tax was initially a means of raising money for public school education; yet here the tax money would not be returned to the Tribe in the form of educational benefits as the federal government presently meets the bulk of the cost of educating the Indians.[3]

The federal government uses various instrumentalities in dealing with all phases of its obligations to the American people, such as the V. A. and F.H.A. 25 U.S.C. 470 establishes the tribe as an instrument in fulfilling the national goal of economic betterment of Indian tribes. The Congress could have established this fund directly under the Department of the Interior, but to promote Indians toward economic self-reliance these funds were placed directly in the hands of the Indians, under the control of the Department of the Interior. Whether by Department control or Tribal control, the ski area is made possible by federal funds provided under 25 U.S.C. 470 which are being utilized by a federal instrumentality.

To tax this enterprise would be to tax an instrumentality employed by the United States for the benefit and control of a sovereign Indian tribe, contrary to established authorities and federal legislation.

[3] 25 U.S.C. 452-454 (The Johnson-O'Malley Act); 20 U.S.C. 239; 631-[illegible] (Impact Aid For Schools).

Conclusion

All of the facts of this case indicate a federal p
fostering economic development of the American
dian. This policy has developed out of a desire to
prove the way of life for these first Americans,
protecting their unique traditions and customs.
policy is also founded in concern for the eco
plight and struggle of these people, for while the
the first Americans, their economic standing is
from first. *Warren Trading Post v. The Arizona*
Comm., supra., recognized this need to bring the
dians up the economic ladder; the President of
United States, in his message to Congress on re
mendations for Indian policies on July 8, 1970,
Doc. No. 91-363, 91st Congress, Second Session (19
again voiced this concern.

The taxing efforts of the State of New Mexico
pletely disregard this federal policy by attempting
remove the cloak of Indian sovereignty and circ
vent the Tribe's efforts for economic betterment
trary to specific federal legislation and holdings
this Court.

For the reasons stated, it is respectfully submit
that the Judgment of the Court of Appeals of
State of New Mexico should be reversed.

Respectfully submitted,

F. Randolph Burroughs and
George E. Fettinger
Attorneys for Petitioner

June 6, 1972

Appendix A

25 U.S.C. Section 476: "Any Indian tribe, or residing on the same reservation, shall have right to organize for its common welfare, and adopt an appropriate constitution and by-laws, shall become effective when ratified by a ma- vote of the adult members of the tribe, or of adult Indians residing on such reservation, as the may be, at a special election authorized and call- the Secretary of the Interior under the rules regulations as he may prescribe. Such constitu- and by-laws, when ratified as aforesaid and ap- by the Secretary of the Interior, shall be re- by an election open to the same voters and ted in the same manner as hereinabove pro- Amendments to the constitution and by-laws ratified and approved by the Secretary in the manner as the original constitution and by-

addition to all powers vested in any Indian tribe bal council by existing law, the constitution ted by said tribe shall also vest in such tribe or bal council the following rights and powers: To legal counsel, the choice of counsel and fixing to be subject to the approval of the Secretary Interior; to prevent the sale, disposition, lease, cumbrance of tribal lands, interests in lands, or tribal assets without the consent of the tribe; negotiate with the Federal, State, and local ments. The Secretary of the Interior shall ad- ch tribe or its tribal council of all appropriation or Federal projects for the benefit of the

tribe prior to the submission of such estimates t
Bureau of the Budget and the Congress.

2. Partial Table of Contents, 25 C.F.R. pt. 91:
regulation is too long to reproduce; for refere
particular sections, a portion of its Table of Co
follows:)

"Part 91 — General Credit to Indians.

Sec.

91. 1 Purpose.
91. 2 Eligible borrowers.
91. 3 Application.
91. 4 Purpose of loans.
91. 5 Approval of loans.
91. 6 Interest.
91. 7 Records and reports.
91. 8 Maturity.
91. 9 Security.
91.10 Penalties on default.
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91.12 Tribal funds.
91.13 Relending by borrower.
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91.15 Charters.
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91.17 Amendments to articles of association and
laws.
91.18 Loans to Navajo and Hopi Indians.
91.19 Loans to encourage industry.
91.21 Loans for expert assistance."

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-738

THE MESCALERO APACHE TRIBE,

Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,

Respondents.

BRIEF FOR AGUA CALIENTE BAND OF MISSION INDIANS AS AMICUS CURIAE

On April 24, 1972, the following order was made in the above-entitled case.

> "The motion of Agua Caliente Band of Mission Indians for leave to file a brief, as *amicus curiae*, is granted."

The Agua Caliente Band of Mission Indians is a duly recognized American Indian Tribe functioning under their own Constitution and By-laws with the approval of the Secretary of the Interior. Their reser-

vation is located within the geographical boundaries of the State of California. Significant economic development took place on some of their reservation lands after 1955 when Congress for the first time authorized the long term leasing thereof. Thus, through the vehicle of long term leasing the Agua Caliente Indians initiated a program of economic development, but as soon as they realized some income therefrom, they encountered a jurisdictional dispute with the County of Riverside who, under California's possessory interest law, decided to tax lessees of Indian trust lands.

The adverse effect of such a tax made the Agua Caliente Indians acutely aware of what Chief Justice John Marshall meant when he said, "The power to tax is the power to destroy". In addition, they have also become aware of the national pattern presently pursued by local governments to interfere with tribal self-government by imposing various types of taxes that tend to destroy the Indians' economic development programs. With this in mind, the Agua Caliente Indians feel that their contribution in the form of Amicus Curiae might assist this Honorable Court in its determination of a critical legal issue involving Indian Tribes throughout the country.

WHEREFORE, it is respectfully prayed that the amicus brief filed herewith by the Agua Caliente Indians be acted upon by this Honorable Court in a manner compatible with the wishes of the Mescalero Apache Tribe.

RAYMOND C. SIMPSON

Raymond C. S.

INTEREST OF AMICUS CURIAE

The Agua Caliente Band of Mission Indians is a duly recognized tribe of American Indians whose reservation is located in the State of California. The lands comprising their reservation are valuable from an appraisal point of view but since they can't eat dirt, it must be deemed virtually valueless until they are first economically developed. Toward this end the Indians have made a diligent effort to implement the long term leasing program authorized by Congress in 1955.

After the passage of more than sixteen years, these efforts have led to realized income from only five percent of their reservation lands. This is due in no small part to the fact that they were seriously frustrated and definitely deterred in 1961 when the County of Riverside decided to depart from their historical "hands off" policy respecting Indian trust lands and imposed a possessory interest tax upon the lessees of their Indian trust lands. The tribe regarded this as an unwarranted and illegal assertion of jurisdiction. Hence, when Respondents undertake to circumvent the sovereignty of the Mescalero Apache Tribe by imposing taxes on a tribal entity, they thereby create a roadblock for the economic development of the Tribe, and as an American Indian Tribe attempting to achieve economic development of its reservation lands, the Agua Caliente Indians therefore have a truly vital interest in the outcome of this case.

QUESTIONS PRESENTED

The questions presented by the case at bar are:

1. Does the taxation invoked by the Respondents constitute an interference with the sovereignty of the Mescalero Apache Tribe?

2. Does this taxation by Respondents frustrate a clear federal policy and program of encouraging Indian tribes to pursue programs designed to produce economic development on their reservations.

I

ARGUMENT

Taxation By The State Of New Mexico Of The Personal Property Of An Indian Tribe Or The Imposition Of A Privilege Tax Upon An Indian Tribal Enterprise Definitely Frustrates A Clear Federal Policy To Produce Economic Development Upon Indian Reservations.

President Nixon in a Message to Congress on July 8, 1970, said:

> "The destiny of Indians and Indian communities throughout the United States is dependent upon their ability to utilize productively their remaining lands and natural resources. The federal government has acknowledged its trust responsibility to Indians, which arises out of a history of unfortunate relations between the nation and its original inhabitants. In pursuance and fulfillment of this responsibility, the government has afforded certain advantages to its Indian wards. Special treatment and programs for Indians are nec-

essary to compensate for unconscionable dealings with the Indians in the past and to remedy the most alarming present state of abysmal poverty and despair that typifies Indian communities."

A year later, on December 11, 1971, the Senate passed Senate Concurrent Resolution 26. This statement of national Indian policy specifically replaces the termination policy embodied in House Concurrent Resolution 108, 83rd Congress (August 1, 1953). It proclaims

> That it is the sense of Congress that . . . . . improving the quality and quantity of social and economic development efforts for Indian people and *maximizing opportunities for Indian control and self-determination* shall be a major goal of our national Indian policy. (emphasis added)

It is the primary purpose of the Bureau of Indian Affairs to implement a federal policy of changing this situation. Every year, as part of its proposed budget for the coming fiscal year, the Bureau of Indian Affairs makes the following statement to the House and Senate Appropriation Subcommittees considering its budget request:

> "The ultimate goals of the Bureau of Indian Affairs for the Indian people are maximum economic self-sufficiency, equal participation in American life and equal citizenship privileges and responsibilities. The Bureau is working toward

the attainment of these goals through two basic programs, one of which is education, and the other is the economic development of reservation resources."

The United States recognized that the reservation system has imposed severe limitations on the ability of Indians to maintain a livelihood. Limitation of land area changed traditional patterns of living; confinement to lands which were unfertile and short of water made it difficult to eke out even a subsistence standard of living; and removal to new, often strange areas was destructive of family and community which is the basis of cultural identity and social structure.

With a gradual decline in direct subsidies and a realization that paternalism would only foster continued dependence, there has emerged a Federal policy of encouraging economic development and self-sufficiency. The future of those programs is in grave doubt if Indians lose by judicial fiat the slim but important margin of advantage Congress has afforded them through exemption of their land and its income from taxation. As this Court emphasized in *Choate v. Trapp*, 224 U.S. 665 (1912) the Indians' tax exemption is a valuable and vested property right.

The case at bar, however, presents a serious new question for the Court's decision. This Court's decision will definitely determine the success or failure of a Federal policy designed to produce economic development and self-sufficiency for Indians and Indian enterprises. The purpose of this Federal policy is

clearly profitability of the Indian enterprise, and the measure of the Federal policy's success is the degree of economic improvement in the Indians' economic position. The taxes imposed by the State of New Mexico directly interfere with this Federal policy and goal, and a matter of such grave importance should therefore command the attention and assistance of this Court. *Williams v. Lee* 358 U.S. 217 (1959).

II

Taxation By The State Of New Mexico Upon Personal Property Owned By An Indian Tribe Constitutes An Illegal Interference With Tribal Sovereignty.

From the earliest years of the Republic Indian tribes have been recognized as "distinct, independent, political communities." *Worcester v. Georgia*, 6 Pet. 515, 559 (1832), and, as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty. Thus, treaties and statutes of Congress have been looked to by the courts as limitations upon original tribal powers, or, at most, evidences of recognition of such powers rather than as the direct source of tribal powers. This is but an application of the general principal that "It is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror." *Wall v. Williamson*, 8 Alabama 48, 51. In fact, in 1959 the United States Supreme Court made it clear that the

law had not changed on this subject when it stated "over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained." *Williams v. Lee*, 358 U.S. 217, 219. The test of whether a State statute may be enforced upon an Indian reservation is "whether the application of that law would interfere with reservation self-government". Organized *Village of Kake v. Egan*, 369 U.S. 60, 67-8, 75 (1962).

Perhaps the most basic principle of all Indian law, supported by a host of decisions, is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express Acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian Tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. Statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty, and therefore properly falls within the sta-

tutory category, "powers vested in any Indian Tribal Council by existing law".

The Acts of Congress which appear to limit the powers of Indian tribes are not to be unduly extended by doubtful inference. What was said in the case of in re *Mayfield*, 141 U.S. 107 is still pertinent:

> "The policy of Congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization. We are bound to recognize and respect such policy and to construe the acts of the legislative authority in consonance therewith."

In point of form, it is immaterial whether the powers of an Indian tribe are expressed and exercised through customs handed down by word of mouth or through written constitutions and statutes. In either case the laws of the Indian tribe owe their force to the will of the members of the tribe. The status of Indian nations or tribes, preserving their political entity under the decisions of the Supreme Court, has been summed up in Felix F. Cohen's "Handbook of Federal Indian Law," at page 122, as follows:

> "The whole course of judicial decision and the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses in the first instance, all

the powers of any sovereign state. (2) Conquest renders the tribe subject to legislative powers of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e. g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i. e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government."

In *United States v. Kagama*, 118 U.S. 375, 6 Supreme Court 1109, 1112, the Court sums up the status of the Indian in the following language:

> "They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relation; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, thus far not brought under the laws of the Union or of the State within the limits they reside."

The acknowledgment of tribal sovereignty or autonomy by the courts of the United States has not been a matter of lip service to a venerable but outmoded theory. The doctrine has been followed through the most recent cases, and from time to time car-

ried to new implications. Moreover, it has been administered by the courts in a spirit of genuine respect. In fact, the painstaking analysis by the Supreme Court of tribal laws and constitutional provisions in the Cherokee intermarriage cases, (203 U.S. 706) is typical, and exhibits a degree of respect proper to the laws of a sovereign state.

The whole course of congressional legislation with respect to the Indians has been based upon a recognition of tribal autonomy. As was said in a Report of the Senate Judiciary Committee (prior to the enactment of the United States Code, Title 18, Sec. 548); "Their right of self-government, and to administer justice among themselves, after their rude fashion, even to inflicting the death penalty, has never been questioned." (Sen. Report No. 268, 41st Congress, 3rd Session). In fact, the courts have consistently seen fit to view the status of Indian tribes and the sovereignty possessed by them as being above the sovereignty accorded states. For instance, in the case of *Native American Church v. Navajo Tribal Council*, 272 F. 2d 131 (1959), the Court said:

> "But as declared in the decisions hereinbefore discussed, Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States."

From the foregoing it is apparent that the Mescalero Apache Tribe possesses that all important attribute of sovereignty known as the power to tax. It must be conceded that this is an essenial, if self-government by an Indian tribe is to be meaningful and compatible with the recognition evidenced by the many decisions by the United States Supreme Court dealing with the subject. The tribe can only be deprived of this right by an Act of Congress. Hence, any taxation by the State of New Mexico of personal property owned by an Indian tribe or the imposition of a privilege tax upon an Indian tribal enterprise clearly constitutes an interference with tribal sovereignty, and such taxation therefore should not be allowed.

CONCLUSION

The attempted taxation of an Indian tribe by the State of New Mexico should be struck down because of its adverse effect upon Indian tribes seeking economic development and self-sufficiency. Imposition of a personal property tax or a privilege tax by the State of New Mexico upon the wholly owned economic enterprise of the Mescalero Apache Tribe clearly frustrates a Federal policy designed to encourage economic development of reservation resources.

Hence, for the reasons set forth in this Brief, the Agua Caliente Band of Mission Indians urge this Honorable Court to render a decision in favor of the Mescalero Apache Tribe.

Respectfully submitted,

AGUA CALIENTE BAND
OF MISSION INDIANS

Raymond C. Simpson

By RAYMOND C. SIMPSON
Tribal Attorney

by SBO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-738

THE MESCALERO APACHE TRIBE,
Petitioner,

v.

FRANKLIN JONES, COMMISSIONER
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THE BUREAU OF REVENUE OF
THE STATE OF NEW MEXICO,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., THE HUALAPAI TRIBE, THE LAGUNA PUEBLO, THE METLAKATLA INDIAN COMMUNITY, THE NAVAJO TRIBE, THE SAN CARLOS APACHE TRIBE, THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, AND THE SENECA NATION, as AMICI CURIAE, IN SUPPORT OF PETITIONER.
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I. INTEREST OF AMICI CURIAE

The parties have consented, by written stipulation of May 18, 1972, to the filing of this brief. The stipulation has been filed with the Clerk of the Court.

The interest of the Association on American Indian Affairs, Inc., the Hualapai Tribe of Arizona, the Laguna Pueblo of New Mexico, the Metlakatla Indian Community of Alaska, the Navajo Tribe of Arizona and New Mexico, the Nez Perce Tribe of Idaho, the San Carlos Apache Tribe of Arizona, the Salt River Pima-Maricopa Indian Community of Arizona, and the Seneca Nation of Indians of New York in the question presented by this case is fully set forth in the motion for leave to file a brief as *amici curiae* in support of the petition for certiorari. In summary, the Association on American Indian Affairs is a non-profit membership corporation, with a nationwide membership of 50,000, devoted to the purpose of protecting the rights and improving the welfare of American Indians. The Indian tribes are recognized tribes of American Indians, all of whom are affected by the same legal, social and economic problems which face the Mescalero Apache Tribe and all of whom are seeking with equal vigor to raise the standard of living of their members through local commercial enterprises and resource development.

This case presents a question of great and continuing concern to the Association and to Indians generally—the question of whether a state may impose its taxation power on activities engaged in by an Indian tribe, with the direct assistance of the federal government, for the social and economic benefit of its members. The Association and the Indian tribes are most of all concerned that the governmental interests of the United States in Indian self-determination and Indian economic development through self-help be so identified in this case as to remove those interests from the scope of a state's power of taxation.

II. ARGUMENT

A. INTRODUCTION

The Mescalero Apache Tribe, acting through its duly constituted tribal government, and with financial, planning and technical assistance from the federal government, opened a ski resort on lands leased from the United States Forest Service outside the boundaries of the Mescalero Apache Reservation. Income from this tribal enterprise is being used solely for the educational, social and economic welfare of members of the Tribe and to repay funds which were furnished by the federal government for construction of the resort and acquisition of personal property used in the resort's operation. The ski resort, in addition to providing revenue for the welfare of tribal members, provides a job-training center and employment for many tribal members.

The State of New Mexico has attempted to exact two taxes from the Tribe in connection with its business enterprise. One tax is laid upon the gross receipts of the tribal enterprise in return for the Tribe's privilege of doing business in New Mexico. The second tax is laid upon the storage, use or consumption of personal property in connection with the enterprise and is measured by the cost price of the property.

New Mexico's attempt to tax the Mescalero Tribe is the first effort by a state to levy a tax directly upon an Indian tribe for any purpose. It is an attempt which also interferes directly with two current federal policies in Indian affairs. These two policies are to improve the economic status of Indian tribes through federally assisted self-help and to strengthen self-government by encouraging active participation by the tribes in federal

programs which affect the welfare of tribal members. The essence of both policies is to encourage the tribes, acting through their duly constituted tribal governments, themselves to perform functions for the betterment of tribal members which were formerly performed by the federal government with minimal participation by the tribes, and to provide such financial and other assistance as is necessary for the tribes to perform those functions. *Indian Affairs, The President's Message to the Congress*, 5 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 894 (1970).

The question in the case at bar, therefore, is whether the current interests of the federal government in improving the economic condition of our Indian citizens through self-help and in strengthening the self-governmental role of Indian tribes, can be constitutionally subordinated to the interest of a state in raising tax revenues to fulfill general state purposes. If, as in former days, the federal government were itself operating an enterprise for the benefit of an Indian tribe, there would be no question as to that government's immunity from state taxation. There is also no question that instrumentalities utilized by the United States in carrying out powers lawfully residing in that government enjoy the same immunity from state taxation as does the government itself. *Amici curiae* contend that the Mescalero Apache Tribe, acting through its duly constituted tribal government, is such an instrumentality of the United States, and that it is, therefore, absolutely immune from state taxation of any kind without a specific waiver of

and immunity by Congress.[4] *Dep't. of Employment v. United States*, 385 U.S. 355 (1966); *Owensboro Nat. Bank v. Owensboro*, 173 U.S. 664 (1899). Moreover, even if the tribe were not such an instrumentality in the constitutional sense, it is at least performing many federal functions, and no state tax can be exacted from the Tribe which would interfere with the performance of those functions. *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Union Pacific C. R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5 (1873).

II. THE MESCALERO APACHE TRIBE IS A FEDERAL INSTRUMENTALITY AND, THEREFORE, ABSOLUTELY IMMUNE FROM TAXATION BY THE STATE OF NEW MEXICO

The principle that the states have no power to impose a taxation burden upon the means utilized by the federal government to fulfill that government's powers was established early in the history of our nation. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). As the following discussion will show, Indian tribes not only operate in a framework of controlling federal law, but also perform a variety of governmental functions which otherwise would fall upon the United States. These tribes thus constitute federal instrumentalities, and are insulated by the federal government's immunity from the

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[4] The State of New Mexico does not contend that the Congress of the United States has conferred power upon it to exact a tax of any kind from the Tribe. The State argues that the New Mexico Enabling Act of June 20, 1910, 36 Stat. 557, did not *preclude* the State from exercising its taxing powers with respect to Indian or tribal property used in connection with off-reservation activity.

direct application of state tax laws, even with respect to off-reservation economic development activities.

That the federal government has paramount power over Indians, Indian tribes and Indian affairs is unquestioned. This power is founded upon the Constitution [U.S. CONST., Art. 1, §8, cl. 3; Art. II, §2, cl. 2; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 350, 379 (1832)]; upon the fiduciary relationship between the federal government and Indian tribes [*United States v. Kagama*, 118 U.S. 375, 383 (1886)]; and upon the nature of the federal government's relationship to Indian land. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 240, 259, 261 (1823).

There is also no limit to the territorial scope of the federal government's paramount Indian power. Since the federal power finds its source not only in the trust relationship of the federal government to Indian land, but also in the Constitution and treaties of the United States, this Court long ago recognized that the exercise of the power is not restricted to property or activities within the boundaries of a reservation. *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 417-18 (1866); *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876). The only limit to the federal government's Indian power is that it depends upon the continued existence of tribal organization. *United States v. Sandoval*, 231 U.S. 28 (1913); *Perrin v. United States*, 232 U.S. 478 (1914).

The United States, of course, continuously has recognized the tribal existence of the Mescalero Apache Tribe. It entered into a treaty with the Tribe on July 1, 1852. 10 Stat. 979. The Congress has passed numerous statutes dealing with the Tribe specifically.[2] Pursuant to the Act

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[2] *See, e.g.*, Act of June 20, 1878, 20 Stat. 206; Act of April 23, 1880, 21 Stat. 81; Act of March 3, 1881, 21 Stat. 485; Act of

of June 18, 1934, 48 Stat. 984, the Secretary of Interior approved the constitution of the Tribe on March 25, 1936, and the Tribe now performs its self-governmental functions in accordance with that constitution. The Tribe, in performing those self-governmental functions, is also subject to a host of general statutes dealing with Indian tribes [e.g., Title 25, United States Code] and extensive regulations [e.g. Title 25, Code of Federal Regulations] promulgated by the Secretary of the Interior pursuant to his discretionary authority over Indian affairs. 25 U.S.C. §[illegible].

This continuous federal recognition of the tribal status of the Mescalero Apache Tribe fully supports the plenary power of the federal government over the Tribe, acting through its duly constituted tribal government, within or without the boundaries of the Mescalero Reservation. Federal recognition of tribal status is also one of the bases which supports the proposition that the Tribe is an instrumentality of the United States in fulfilling its plenary powers and is immune from all forms of state taxation laid directly thereon.

The Court recently stated that there is "no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality." *Dept. of Employment v. United States*, 385 U.S. 355, 359 (1966). The Court there held that the Red Cross was an instrumentality of the United States, absolutely immune from state taxation without specific consent from Congress, because of a number of factors showing a close relation to federal

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January 6, 1923, 42 Stat. 1222; Act of May 25, 1918, 40 Stat. [illegible]; Act of March 29, 1928, 45 Stat. 1776; Act of June 22, 1936, [illegible] Stat. 213.

activities. The Red Cross provides services to our Armed Forces, helps to fulfill some of the treaty commitments of the United States and assists the federal government with domestic disaster relief. 385 U.S. at 359. Performance of these federal functions was sufficient to grant the Red Cross the constitutional status of an instrumentality even though "government officials do not direct its everyday affairs." 385 U.S. at 360. The Court also relied on certain statutes [42 U.S.C. §§1855a(f); 1855b; 1855c] to show that Congress has recognized that the Red Cross performs national functions. 385 U.S. at 359. These statutes provide for distribution of supplies through the Red Cross in times of domestic disaster and for cooperation between federal agencies and the Red Cross in providing disaster assistance.

The Court has also held that an Army post exchange, selling retail goods to the Armed Forces, is a federal instrumentality since operated pursuant to federal authority and subject to regulations of the Secretary of the Army. *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942). This authority and regulation, "together with the relevant statutory and constitutional provisions from which they derive, afford the data upon which the legal status of the post exchange may be determined." 316 U.S. at 483. The Court also noted that Congress had recognized the governmental activities of post exchanges by appropriating funds from time to time for the construction thereof. 316 U.S. at 484. Furthermore, post exchanges do not operate for private profit purposes. 316 U.S. at 485. See also *Query v. United States*, 316 U.S. 486 (1942).

In determining whether an institution is an instrumentality of the United States, it is immaterial that the

institution engages in proprietary activities. Since all of the authority of the federal government is derived from constitutional powers, the Court has often made clear that for the purpose of applying the doctrine of federal immunity from state taxation there is no distinction between proprietary and governmental instrumentalities.[3] *Federal Land Bank v. Board of County Commissioners*, 368 U.S. 146 (1961); *Van Brocklin v. Tennessee*, 117 U.S. 151 (1886); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939).

While the Court weighs a number of factors in determining whether an institution is an instrumentality, there appear to be two factors that are of primary importance.[4] The object seeking to clothe itself in federal immunity must be designed to carry out a federal program or purpose [*Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941); *Owensboro Nat. Bank v. Owensboro*, 173 U.S. 664 (1899)] and it is not entitled to tax immunity, even though it fulfills a federal function, if it exists primarily for private profit purposes.

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[3]Any claim that the Mescalero Apache Tribe, by operating a business enterprise, is performing proprietary rather than governmental functions would only be relevant if the Tribe were claiming immunity from federal tax on the grounds of being a state instrumentality. *New York v. United States*, 326 U.S. 572 (1945); *Allen v. Regents*, 304 U.S. 439 (1938); *Ohio v. Helvering*, 292 U.S. 360 (1934). The Tribe, of course, makes no such claim.

[4]An additional primary factor which the Court should weigh in determining whether an Indian tribe is an instrumentality of the United States is that it cannot be sued, for payment of taxes or otherwise, without the specific consent of Congress. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Red Cliff Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 376 F.2d 829 (8th Cir. 1967); *Maryland Casualty Co. v. Citizens Nat. Bank*, 361 F.2d 517, 520 (5th Cir. 1966).

United States v. Boyd, 378 U.S. 39 (1964); *United States v. Township of Muskegon*, 355 U.S. 484 (1958).

In *United States v. Rickert*, 188 U.S. 432 (1903), the Court had occasion to consider the applicability of the instrumentality doctrine in Indian affairs.[5] There the Court held that lands, improvements thereon, and personal property of Indian allottees were instrumentalities of the United States in fulfilling federal purposes as reflected in the General Allotment Act of February 8, 1887, 24 Stat. 388, *codified at* 25 U.S.C. §331 *et seq.* These purposes were for the United States to hold allotted lands in trust for individual Indians for a period of time and to transfer the lands in fee to the allottees when they were found capable of handling their own affairs. The lands, improvements and personal property were found to be the means adopted by the United States to prepare the Indian allottees for absorption into the American mainstream. 188 U.S. at 437. *See also Dewey County v. United States*, 26 F.2d 434 (8th Cir. 1928); *United States v. Thurston County*, 143 F. 287 (8th Cir. 1906).

Rickert was decided at a time when the policy of the United States in Indian affairs was to break up tribal organization and to force the assimilation of Indians into the general society and economy. Means were adopted by

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[5] The first case involving the attempt by a state to tax individual Indians was *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866). The Court did not dispose of the issue on grounds of the instrumentality doctrine but solely on jurisdictional grounds. So long as the United States recognizes the tribal existence of any Indians, the Court stated, they and their property are withdrawn from the operation of all state laws and enjoy the privilege of "total immunity" from state taxation. 72 U.S. (5 Wall.) at 755, 757.

the federal government gradually to achieve this goal and Eickert gave to those means the status of tax-immune instrumentalities. The allotment scheme, however, was a disaster for the tribes. The primary result was that vast tracts of Indian land were transferred to non-Indian ownership, and the scheme enjoyed little success in its efforts to break down tribal organization. The allotment scheme, as a measure to force Indian assimilation, subsequently was abandoned. Haas, *The Legal Aspects of Indian Affairs from 1887 to 1957*, 311 ANNALS 12 (1957).

The Congress having recognized the drastic failure of the General Allotment Act, in achieving its purposes, reversed that policy in 1934 and adopted new means to fulfill its new policy. Indian Reorganization Act of June 18, 1934, 48 Stat. 984, *codified at* 25 U.S.C. §461 *et seq.* One of the central purposes of the Act was to "stabilize the tribal organizations . . . with real, though limited, authority and [to set down] conditions which must be met by such tribal organizations." S. Rep. No. 1080, 73d Cong., 2d Sess. 1 (1934). Substantial land was restored to tribal ownership, and new lands replaced some of the tribal lands lost to non-Indian ownership during the allotment period. 25 U.S.C. §§463, 465. Lands and other rights acquired for the tribes were declared specifically to be free from state and local taxation. 25 U.S.C. §465. Funds were appropriated for the organization of Indian corporations [25 U.S.C. §469] and for the operation of those corporations. 25 U.S.C. §470. The provisions of the Act applied to all recognized tribes in the United States other than the tribes in Oklahoma. 25 U.S.C. §473.

The central purpose of the Indian Reorganization Act was to institutionalize tribal organization. To that end,

the tribes were encouraged and authorized to adopt constitutions which were subject to ratification by the tribal members and approval by the Secretary of the Interior. 25 U.S.C. §476. The Act declared that such constitutions should enumerate certain specific powers of the tribes, "in addition to all powers vested in any Indian tribe or tribal council by existing law." 25 U.S.C. §476. All of the constitutions so adopted were, in fact, prepared by the Department of Interior. *See Hearings on Const. Rights of the American Indian*, 87th Cong., 1st Sess., pt. 1, at 165 (1962).

The purposes of the Indian Reorganization Act, therefore, were to be fulfilled by a number of means. The central means was to be the tribe, acting through its duly constituted tribal government, for the common welfare of tribal members. The tribe, therefore, acting pursuant to its constitution, is no less an instrumentality for effectuating federal policy, than were the lands, improvements and personal property in *United States v. Rickert, supra.* In 1934 the Congressional policy had changed, and the focus of the means adopted to effectuate that policy had changed from the allotment scheme to organized tribal government, but the principles established in *Rickert* were as applicable in 1934 as in 1903.

Except for a brief period in the 1950's, Congress has not waivered from its purpose of institutionalizing tribal organization. In the 1950's Congress specifically permitted a number of states to assume civil and criminal jurisdiction over tribes within their borders and provided for additional states to assume such jurisdiction in the future without the consent of the affected tribes. Act of August 15, 1953, 67 Stat. 588, *codified at* 18 U.S.C. §1162; 28 U.S.C. §1360. In 1968, however, Congress

prohibited any further assumption of state jurisdiction without the consent of the tribes and made tribal governments, for the first time, subject to restrictions in dealing with tribal members similar to those contained in the United States Constitution's Bill of Rights. Act of April 11, 1968, 82 Stat. 77, *codified at* 25 U.S.C. §1301-41 (Supp. 1972). The Congress in drafting this legislation took great pains to preserve the tribes as self-governing, culturally autonomous units [*see Hearings on Const. Rights of the American Indian*, 87th Cong., 1st Sess., pt. 1 (1962); 87th Cong., 1st Sess., pt. 2 (1963); 87th Cong. 2d Sess., pt. 3 (1963)] and to continue the policy established by the Indian Reorganization Act.

Pursuant to its constitution, the Mescalero Apache Tribe performs numerous self-governmental functions. Control of tribal lands is committed to the Tribal Council, subject to applicable federal authority. Art. III, §1. Rights of membership in the Tribe are to be determined by the Tribal Council in accordance with the tribal constitution; and no decree of any court, other than the tribal court, may purport to determine membership rights in the tribe. Art. IV, §§3, 5. The Tribal Council is empowered to veto any attempted disposition of tribal lands by any agency of the federal government without the consent of the Tribe [Art. XI, §1(a)]; to manage tribal lands, acquire additional lands and to regulate the disposition of tribal property of all kinds [Art. XI, §1(b)]; to negotiate contracts, leases and agreements of any description with the approval of the Secretary of the Interior [Art. XI, §1(f)]; to condemn land of tribal members for public purposes [Art. XI, §1(g)]; to act in all matters that concern the welfare of the tribe [Art. XI, §1(h)]; to adopt ordinances regulating law enforcement on the reservation, regulating social and domestic rela-

tions of tribal members, regulating inheritance of personal property of tribal members, and regulating the exclusion of non-members from the Reservation. Art. XI, §1(p). The Tribal Court is empowered to exercise jurisdiction in all criminal matters involving members of the Mescalero Apache Tribe or members of other Indian tribes residing on the reservation, subject to certain conditions. Art. XXV, §1; *see also*, 18 U.S.C. §1152. The Tribal Court is also authorized to exercise absolute civil jurisdiction where only members of the Tribe are involved. Art. XXV, §2.

The Tribal Council is empowered to adopt plans of operation for the conduct of business or industry that will

> "further the economic well being of the members of the tribe, and to undertake any activity of any nature whatsoever, not inconsistent with Federal law or with this Constitution, designed for the social or economic improvement of the Mescalero Apache people, such plans of operation and activities to be subject to review by the Secretary of Interior." Art. XI, §1(d).

The tribal council must annually adopt and approve a budget for every tribal business enterprise and that budget must be approved by the Secretary of Interior. Art. XIII, §1.

The constitution of the Mescalero Apache Tribe institutionalizes all powers of self-government of the Tribe which the Tribe enjoyed prior to adoption of the constitution and which this Court has zealously protected from interference by the states, in the absence of specific consent to such interferences from Congress, for almost 150 years. *See, e.g.*, *Williams v. Lee*, 358 U.S. 217 (1959); *United States v. Quiver*, 241 U.S. 602 (1916);

Jones v. Meehan, 175 U.S. 1 (1899); *Talton v. Mayes*, 163 U.S. 370 (1896). Only where there was no threat to the federal interest in Indian self-government has this Court been willing to permit a state even peripherally to touch the self-governmental powers of the tribes, in the absence of specific consent from Congress. *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *United States v. McBratney*, 104 U.S. 621 (1881); *Langford v. Monteith* 102 U.S. 145 (1880).

The interests of Congress in Indian economic development, for the benefit and welfare of tribal members, and in strengthening tribal self-government are, therefore, apparent in this case. The tribe, and its duly constituted tribal government, is not only one of the means but the very focal point upon which fulfillment of these interests is predicated. The Congress has recognized not only the existence, but also the governmental activities of the Tribe through statutes, administrative regulations and practice, and through appropriations for the benefit of the tribe. *See, e.g., Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942). The Tribe is clearly carrying out federal purposes and its continued existence by consent of Congress is designed to fulfill these purposes. *See, e.g., Federal Land Bank v. Bismark Lumber Co.*, 314 U.S. 95 (1941). It does not exist, of course, for private purposes. *See, e.g., United States v. Boyd*, 378 U.S. 39 (1964).

The doctrine of intergovernmental tax immunity must protect the Mescalero Apache Tribe, as an instrumentality of the United States, from state taxation. While the Court has found no simple test for determining what is an instrumentality, the Mescalero Apache Tribe survives any

test which the Court has applied.* If national banks are to be given the continued status of instrumentalities for the purpose of immunity from state taxation, particularly when their federal functions are today extremely limited compared with the functions which they performed when the *McCulloch* decision was rendered, then surely Indian tribes are entitled to the same status. *First Agric. Nat. Bank v. State Tax. Comm.*, 392 U.S. 339 (1968); *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239 (1931); *First Nat. Bank v. Anderson*, 269 U.S. 341 (1926); *Owensboro Nat. Bank v. Owensboro*, 173 U.S. 664 (1899); *Osborn v. United States*, 22 U.S. (9 Wheat.) 738 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

C. IF THE MESCALERO APACHE TRIBE IS NOT A FEDERAL INSTRUMENTALITY, IT NONETHELESS PERFORMS FEDERAL FUNCTIONS WHICH ARE UNCONSTITUTIONALLY BURDENED AND IMPEDED BY THE TAXES SOUGHT TO BE EXACTED BY THE STATE OF NEW MEXICO IN THIS CASE

In applying the instrumentality doctrine, the decisions of the Court have not often drawn a rigid line between the taxable and the immune. The Court has been required, in many cases before it, to observe

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*The fact that the tribal enterprise is located outside the boundaries of its reservation has no relevance to application of the instrumentality doctrine. *See* text supra, p. 6. If this were to be the basis for denying the Tribe that status, then the federal government's immunity depends upon its use of means solely within the reservation boundaries to fulfill its powers over Indian affairs. There are no such territorial limits to the scope of the federal government's Indian powers. There cannot, therefore, be any such territorial limit to the means the federal government adopts to fulfill those powers.

[illegible] distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both nation and state under our dual system.

James v. Dravo Contracting Co., 302 U.S. 134, 150 (1937). The central problem which the Court has encountered in applying the immunity doctrine since *McCulloch* occurs where private citizens or institutions have sought to clothe themselves in the absolute immunity of the federal government. *See, e.g., Alabama v. King & Boozer*, 314 U.S. 1 (1941); *Union Pacific C.R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5 (1873). As the Court stated in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 483 (1939):

> [T]he expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed.

In most of the immunity cases in which the Court has determined that persons or institutions were not instrumentalities of the United States, the claimants of that status were performing limited governmental functions, engaged in government activity in a limited fashion and for a purpose of reaping private profits or deriving some private benefit. *See, e.g., James v. Dravo Contracting Company*, 302 U.S. 134 (1937); *Alabama v. King & Boozer*, 314 U.S. 1 (1941); *Wagoner v. Evans*, 170 U.S. [illegible] (1898); *Union Pacific C.R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5 (1873). In denying such claimants the status of instrumentalities, which would have made them abso-

lutely immune from state taxation, the Court has applied a qualification of the instrumentality doctrine in order to protect federal governmental interests from state taxation while not extending the cloak of immunity to the claimant's private interest. This qualification is that even if one dealing with the government is not an instrumentality, the performance of his federal function may not be interfered with by state taxation efforts.[7] *See, e.g., Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Trinityfarm Constr. Co. v. Grosjean*, 291 U.S. 466 (1934); *Alward v. Johnson*, 282 U.S. 509 (1931); *Union Pacific C.R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5 (1873). This rule has been applied to non-Indian business lessees and licensees of Indian land.[8] *Montana Catholic*

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[7] A third element of the intergovernmental tax immunity doctrine is that the states can never tax, in any form, the property interests of the United States regardless of whether these interests are in the hands of the United States, an instrumentality thereof or someone dealing with the federal government in a limited fashion such as a lessee or contractor. *United States v. County of Allegheny*, 322 U.S. 174 (1944); *Mayo v. United States*, 319 U.S. 441 (1943); *Wisconsin Central R.R. Co. v. Price County*, 133 U.S. 496 (1889). Property interests of the United States are being taxed in this case in the sense that the funds for construction of the tribal enterprise, and for acquisition of personal property used in the enterprise, were provided by the United States.

[8] In the non-Indian lessee and licensee cases cited in the text, the Court found no interference with any federal function of the lessee or licensee. The Court subsequently switched to clothing non-Indian lessees in federal immunity. *Choctaw O. & G. R. Co. v. Harrison*, 235 U.S. 292 (1914); *Howard v. Gipsy Oil Co.*, 247 U.S. 503 (1918); *Gillespie v. Oklahoma*, 257 U.S. 501 (1922); *Jayhawk Mining Co. v. Weir*, 271 U.S. 609 (1926). In these cases the Court held that the non-Indian lessees or the leases themselves were instrumentalities of the United States in performing some federal

Missoula, 200 U.S. 118 (1905); *Thomas v.* 169 U.S. 264 (1898); *Wagoner v. Evans*, 170 U.S. (1898).

The federal functions of the Mescalero Apache Tribe, through its duly constituted tribal government,

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to the Indian lessors. No inquiry was made into any of the taxes involved impaired any federal functions the lessees since a finding that either the lessees or leases were instrumentalities resulted in total immunity from state taxation. of the results of this line of cases was that lessees of state were held immune from federal taxes on the theory of reciprocal immunity of federal and state governmental instrumen- *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932). As the Court, concerned with the growing cloak of immunity private interests specifically overruled many of the cases non-Indian lessees and began a trend, in cases not Indians for the most part, to deny the status of instru- to mere agents of the federal and state governments in their own private interests and to apply the sole test of a federal or state tax impaired any federal or state of such agents. *Graves v. New York ex rel. O'Keefe*, 306 466 (1939); *Alabama v. King & Boozer*, 314 U.S. 1 (1941); *v. Mountain Producers Corp.*, 303 U.S. 376 (1938).

After these non-Indian lessee cases had been reversed, the Court only one further occasion to consider the status of non-Indian directly. In *Oklahoma Tax Commission v. Texas Co.*, 336 342 (1949), the Court found that such a lessee was not an of the federal government and that a state tax upon the lessee's share of the oil produced from the Indian did not impair any federal function of the lessee. The Court noted that the case did not involve taxation of the of the Indians themselves. 336 U.S. at 352.

The result of all of these cases is that non-Indians were no permitted to cloak themselves with federal immunity by of their peripheral contacts with Indian affairs. No rights of individuals were directly impaired and no rights of Indian were directly involved.

have been enumerated in the previous section. One of its primary functions is to work with the Secretary of Interior to improve the economic welfare of tribal members. It is authorized, to this end, to set up business enterprises, with the income therefrom to be used for the benefit of tribal members and for effectuating many self-governmental powers and duties conferred upon, and confirmed to, the Tribe by the federal government. The State of New Mexico has attempted to exact a tax measured by the gross receipts of the enterprise in return for the Tribe's privilege of doing business in the State. This tax could prevent the enterprise from generating any income with which the Tribe can fulfill its federal functions. A second tax is laid upon the personal property of the Tribe used in the enterprise, and this tax has the effect of diminishing not only income but the amount of funds available to the Tribe to invest in such an enterprise. Such taxes fall directly upon the Tribe and would interfere with the performance of the Tribe's functions to the same extent, at the very least, that a tax laid directly on a contract with the federal government, or a tax for the privilege of performing the contract, would impair the federal function of a government contractor. Such taxes are impermissible. *See, e.g., Kern-Limerick v. Scurlock*, 347 U.S. 110 (1954); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937).

III. CONCLUSION

The policy of the federal government in Indian affairs has vacillated between attempts to assimilate Indians into the general society and economy and attempts to protect their cultural identity. The Congress and the President have now rejected the past federal termination policies in

part of a policy to improve the economic status of Indian tribes through federally assisted self-help and to strengthen self-government by encouraging active tribal participation in developing an economic base that will support and sustain tribal life.

The traditional economic bases of Indian life are no longer sufficient to sustain the majority of Indians on most reservations. Accordingly, the federal government has encouraged the tribes to adopt some elements of the modern economy. Many tribes have done so within the boundaries of their reservations, particularly those tribes whose remaining natural resources can be used in a planned program of economic development. Other tribes, with the assistance of the federal government, have had to adopt the only means of economic development available to them, even if those means are located outside the confines of their reservations. The Mescalero Apache Tribe is one of those tribes.

The federal government now recognizes that if Indians are to escape from the economic, social and psychological depression and dependence created by some past federal policies, it must commit itself to help Indian tribes advance towards economic and social goals of their own choosing. The government is clearly fulfilling this commitment in this case. The interests of the federal government which are reflected in that commitment must not be subordinated to general revenue-raising interests of a state. This Court always has protected the right of the federal government to be free from state limitation in fashioning its policy for regulation of Indian affairs. That right is threatened again in this case. Not only law but a

century and one-half of history have committed to Court the task of dispelling that threat.

Respectfully submitted,

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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-738

THE MESCALERO APACHE TRIBE, *Petitioner*,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, *Respondents*.

On Writ of Certiorari to the Court of Appeals of the State of New Mexico

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BRIEF FOR THE RESPONDENTS

JURISDICTION

Respondents are dissatisfied with the statement of the Petitioner as to the grounds on which jurisdiction of this Court is invoked. The following additions and inaccuracies are noted:

(1) There is nothing in the record to support Petitioner's assertion that the business enterprise

was ". . . by necessity . . ." located primarily on United States lands.

(2) The ski resort, which is owned and operated by Petitioner, is on lands belonging to the U.S. Forest Service which have been leased to the Petitioner for a period of thirty years. (App. 3).

QUESTIONS PRESENTED

(1) Can the State of New Mexico impose its compensating use tax upon the use of tangible personal property, owned by an Indian Tribe, and use outside the boundaries of the Tribe's reservation?

(2) Can the State of New Mexico impose its gross receipts tax upon the receipts of an Indian Tribe from the operation of a ski resort exclusively owned by the Tribe and located almost entirely outside the boundaries of the Tribe reservation?

STATEMENT

The Respondents wish to correct some inaccuracies in the Petitioner's statement of the case:

(1) There is nothing in the record to support Petitioner's assertion on pages 7 and 8 of its Brief that ". . ., the facilities at the ski area are under federal control through the Department of the Interior the same as any facility located within the actual boundaries of the reservation."

(2) There is nothing in the record to support Petitioner's assertion on page 8 of its Brief that the purchase of materials were subject to and approved by the Bureau of Indian Affairs ". . ., all as outlined in 25 C.F.R. pt. 91." The full statement of fact concerning this matter is found

in paragraph 10 of the Stipulation of Facts before the New Mexico Court of Appeals. (App. 5 and 6).

SUMMARY OF ARGUMENT

The Petitioner has chosen to engage in business activity as a ski resort outside the boundaries of its reservation. As a result of these activities, New Mexico gross receipts tax was imposed on the Petitioner's receipts from sales of services and tangible personal property and New Mexico compensating tax was imposed on the use of materials used to construct two ski lifts at the ski resort. The State of New Mexico has authority to impose these taxes pursuant to its Enabling Act and was not otherwise prohibited by law from imposing these taxes.

A. The United States has not exercised its powers under the Commerce Clause of the United States Constitution to regulate commerce with the Petitioner. U.S. Const., Art. I, § 8, cl. 3. No regulation of buyers of Petitioner's services or tangible personal property is shown in the facts of this case and Petitioner is not regulated with respect to persons to whom it sells. Transactions whereby Petitioner purchased materials to construct the ski lifts were only slightly controlled by the United States Department of the Interior and that control was not sufficient to preempt state taxation.

The Enabling Act for New Mexico and the Tribe's Treaty of 1852 with the United States are not in conflict. Pursuant to the Treaty, exclusive jurisdiction over the Tribe was vested in the United States. The United States exercised jurisdiction when Congress enacted the Enabling Act for New Mexico. The En-

abling Act granted New Mexico authority to impose the taxes at issue here.

B. The Tribe has not demonstrated that there has been an interference with its right of reservation self-government under the tests set forth in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), and *Williams v. Lee*, 358 U.S. 217 (1951).

The state's power to tax should not be crippled by extending the concept of interference with Tribal reservation self-government to situations where there is only remote or only possible future interference with the exercise of the functions of government.

Even if there was interference with the business activity of the Tribe, due to the imposition of the taxes, that interference was not with a governmental function, but with a proprietary function of the Tribe.

C. The Tribe is not a federal instrumentality under any of the tests set forth in current decisions of this Court.

ARGUMENT

I

THE STATE OF NEW MEXICO HAS AUTHORITY TO TAX THE PETITIONER

Petitioner has chosen to engage in business in the State of New Mexico outside the boundaries of its reservation. By so doing, it has entered into competition with other business entities. The United States Congress has provided no exemption from the state taxes at issue here for Indian Tribes when they engage in this form of business activity outside their reservations. The taxes imposed upon Petitioner are consistent with both its Treaty of 1852 with the United States (App. 9 to 12) and the Enabling Act for New

Mexico, Chapter 310, § 2, Clause 2, 36 Statutes at Large 557 (1910).

Exclusive jurisdiction over the Mescalero Apache Tribe is not vested in the federal government. The Tribe's Treaty of 1852 specifically provided in Article 1 that it acknowledged and declared itself to be under the laws, jurisdiction, and government of the United States and that it submitted to the power and authority of the United States. 10 Stat. 979; (App. 9). The Treaty became effective March 25, 1853. The State of New Mexico was admitted to the Union on January 6, 1912. 37 Stat. 1723. The Enabling Act for New Mexico is dated June 20, 1910. The Enabling Act was clearly enacted under the power and authority of the United States and it provided in part:

> "... *but nothing herein,* or in the ordinance herein provided for, *shall preclude the said state from taxing, as other lands and other property are taxed, any lands or other property outside an Indian reservation owned or held by an Indian,* save and except such lands as may be granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that such lands shall be exempt from taxation by said state so long and to such extent as Congress has prescribed or may hereafter prescribe." (emphasis supplied)

This provision is very similar to the Constitution of New Mexico, Article XXI, § 2.

The Bureau of Revenue's position is that the Tribe's use of property outside its reservation and its receipts from business activity almost entirely off its reservation are not exempted from taxation by the Enabling Act and that the Enabling Act confers jurisdiction to tax.

The taxes at issue here are not taxes on property. The gross receipts tax is a privilege tax and the compensating tax is an excise tax. Both are measured by the value of property, the property being the Tribe's gross receipts from its off-reservation business activity and materials used to construct two off-reservation ski lifts. (App. 5 and 6). A tax upon the use of property is not a tax upon the property itself. See *United States v. City of Detroit*, 355 U.S. 466 (1958); *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971, U.S. cert. denied February 22, 1972. The incidence of the gross receipts tax at issue here is not on property itself but on the Tribe's sale of services. Compare *Sullivan v. United States*, 395 U.S. 169 (1969). The exemption contained in the Enabling Act with regard to lands which are after acquired by grant or confirmation, exempts the *lands* from taxation; it does not provide any exemption from the taxes at issue here.

The clear purpose of the Enabling Act was to allow the state to tax the business activities of Indians or Indian Tribes, particularly when these business activities occurred outside the Indian Reservation and outside lands granted or confirmed to Indians or Indian Tribes. The Act provided that: ". . . nothing herein . . . shall preclude the . . . state from taxing, as other lands and other property are taxed, any lands or other property outside an Indian reservation owned or held by an Indian, . . ." The purpose of the Act was to put off-reservation Indians on an equal footing with non-Indians with respect to payment of a non-discriminatory tax. There was also perhaps an added purpose of putting New Mexico on an equal footing with the original states with respect to jurisdiction to tax. Compare *Ward v. Race Horse*, 163 U.S. 504 (1896).

There was no federal control present over the Tribe with regard to the persons to whom it sold amusement services and tangible personal property. Neither the seller nor the buyers were controlled. There was also no federal control over the sellers to the Tribe of materials which became a part of the ski lifts, except to the extent that the Bureau of Indian Affairs approved the purchase of these materials. (App. 5). This measure of control by the Bureau of Indian Affairs was not substantially different than that usually exercised by lenders of money over borrowers of money. Because of this absence of federal control, the Tribe's reliance on the Commerce Clause, U.S. Const., Art. I, §8, cl. 3, is misplaced.

The cases, relied on by Petitioner, which found that Congress had exercised control pursuant to the Commerce Clause to a degree sufficient to preclude state control, indicate, without exception, a far greater degree of federal control than that present in this case. See *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965); *United States v. 43 Gallons of Whiskey*, 93 U.S. (3 Otto) 188 (1876); *United States v. Holliday*, 70 U.S. (3 Wall) 407 (1866). The degree of this control is indicated in the following quotation from the *Warren Trading Post* case:

> ". . . the Commissioner has promulgated detailed regulations prescribing in the most minute fashion who may qualify to be a trader and how he shall be licensed; penalties for acting as a trader without a license; conditions under which government employees may trade with Indians; articles that cannot be sold to Indians; and conduct forbidden on a licensed trader's premises. . . ." (380 U.S. 685, 689).

The regulation of Indian liquor sales, at issue in the *Holliday* and *43 Gallons of Whiskey* cases has been described by Professor Cohen as "sweeping." F.S. Cohen, *Federal Indian Law*, 91 (University of New Mexico Press 1942).

Generally, the control exercised by the United States over the use by Indians of their property off the reservation is not as great as the control exercised over their use of the property on the reservation. Therefore, it has been decided that personal property used off the reservation by an Indian is taxable by a state. See *United States v. Porter*, 22 F.2d 365 (9th Cir. 1927); *Federal Indian Law* 866 (U.S. Printing Office 1958); Compare *Pennock v. County Commissioners*, 103 U.S. 44 (1881). Under the facts present in this case, it appears clear that the United States Congress has not exercised its protective and regulatory power over the Tribe in a degree and manner which would pre-empt the State of New Mexico from imposing the taxes at issue here on the Tribe's off-reservation activities.

The State of New Mexico is not required, as is suggested at page 17 of the Brief of the Petitioner, to show that the existence of the ski resort created added burdens for the State. As has previously been argued, the taxes at issue are a privilege and excise tax. The facts are that the Tribe was engaging in off-reservation business activity, which for any other business entity would result in the imposition of these same taxes. The fact that this person had leased government lands on which to locate his business enterprise and had borrowed money from the United States to enable him to begin this enterprise would not have an effect on his liability for the taxes at issue here. The Tribe, in engaging in these business activities, is engaging in a

proprietary function rather than a governmental function and should be considered taxable as any other person unless some clear governmental immunity is established. Theoretical concepts of interference with the functions of government are insufficient. Compare *Oklahoma Tax Commission v. Texas Company,* 336 U.S. 342 (1949).

Immunity or exemption from these taxes is not granted by 25 U.S.C. § 465. The last paragraph of § 465 states:

> "Title to any lands or right acquired pursuant to sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

The land upon which the Tribe's ski resort was located belonged to the United States Forest Service and was leased by the United States Forest Service to the Tribe. (App. 3). The title to the land was apparently in the federal government prior to the time the lease with the Tribe was entered into. No land was *acquired for* the Tribe. If title to the leasehold interest was taken in trust for the Tribe, the United States would have taken a leasehold interest in its own land, in trust for the Tribe. The Bureau of Revenue contends that the record in this case does not indicate that any lands or rights were acquired for the Tribe which could be taken in the name of the United States in trust for the Tribe, because the United States already had title to these lands or rights. For this reason, § 25 U.S.C. § 465 is irrelevant.

Assuming, for purposes of argument, § 25 U.S.C. § 465 is applicable, its application is limited to exempt-

ing lands or rights to land from state and local taxation, and as has previously been argued, the taxes at issue here are not upon lands or rights to land. The general rule is that exemptions to tax laws should be clearly expressed. See *Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418 (1935); *Squire v. Capoeman*, 351 U.S. 1 (1956); *Holt* v. *Commissioner of Internal Revenue*, 436 F.2d 38 (8th Cir. 1966), cert. denied 386 U.S. 931. The scope of 25 U.S.C. § 465 is limited and it should not be extended, through a doctrine of remedial legislation, to the extent that it would be in conflict with the Enabling Act for New Mexico. Compare *United States v. Zacks*, 375 U.S. 59 (1963).

In *Stevens v. Commissioner of Internal Revenue*, 452 F.2d 741 (9th Cir. 1971), which is relied on by the Petitioner, it should be noted that the taxpayer did not question the Tax Court's holding that the income from lands leased from the Gros Ventre Tribe was taxable. Compare *Holt v. Commissioner of Internal Revenue*, *supra*. The income at issue in that case was from allotted lands and the decision relied on *Squire v. Capoeman*, *supra*. The General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331 et seq., provides that at the expiration of a trust period, the United States shall convey the land by patent "in fee, discharged of said trust and free of all charge or incumbrance whatsoever." 25 U.S.C. § 348. The Court of Appeals in *Stevens* noted that the provisions of the General Allotment Act were extended to lands purchased for the benefit of Indians by the Act of February 14, 1923, 42 Stat. 1246, 25 U.S.C. § 335. The Court then stated:

> "These acts manifest a Congressional intent that the benefits and restrictions of the General Allotment Act are to apply to all Indian allotments in

the absence of special legislation indicating a different intent. The construction is of course in accord with long-standing Congressional policy of treating Indians equally except where differences in tribal circumstances justify special legislation." (452 F.2d 741, 745).

Applying that concept, the Court then held that the income tax on income produced on the allotted land, and other lands acquired pursuant to allotment provisions and purchased by the taxpayer, were free of income tax because it constituted a charge or incumbrance. The Court also relied on long standing interpretations by the Department of the Interior. Respondents do not locate any statement in the case indicating that the lands were purchased with a loan acquired pursuant to 25 U.S.C. § 470.

In the *Stevens* case, the land from which the income was derived was restricted land. That situation is not present in this case. There is no provision governing the Tribe's lease of the land from the United States Forest Service which is comparable to the phrase ". . . free of all charge or incumbrance. . . ." contained in the General Allotment Act. That provision was crucial to the Court's decision in the *Stevens* case. Petitioner's reliance on the *Stevens* case is misplaced.

The Petitioner's reliance on *United States v. Rickert*, 188 U.S. 432 (1903), is also misplaced. That case concerned a tax on tangible personal property issued by the United States to Indian allottees which the Court said was, in fact, the property of the United States. A patent or grant after allotment had not been issued. The tax in the instant case was on the use of property by an Indian Tribe in a business enterprise and on the Tribe's receipts from that business enterprise. The Petitioner was not operating its business enterprise on

allotted lands and the tangible personal property which was the measure of the compensating tax was, in fact, the property of the Tribe. Restrictions with respect to allotted lands are not present in this case as they were in *Rickert*.

The Respondents contend that the *Rickert* case should also be considered in terms of the extreme variance of economic conditions and Indian endeavors in 1903 and at present. A tax imposed on an individual Indian's house and plow, which he used in farming in 1903 would have been a serious economic burden to that Indian and might have deterred him from even attempting to provide subsistence for himself on a small farm. The gross receipts tax at issue here is commonly passed on to buyers of property and services. The purpose of the compensating tax at issue here is to protect New Mexico merchants from unfair competition of importations into New Mexico without payment to another state of sales taxes. See N.M. Laws of 1939, ch. 95, § 1 [§ 72-17-1, N.M.S.A. 1953, repealed July 1, 1967].

There is no reason to believe that the imposition of either of these non-discriminatory taxes would have a detrimental effect upon the economic well being of the Petitioner. Other business entities survive and even thrive in New Mexico with these same taxes imposed on their activities. If Petitioner prevails in this case, the result could well be the beginning of the type of constant widening of the exempting process referred to with reference to lessees of Indian lands in *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342 (1949).

Respondents contend there is insufficient basis in law or in fact for granting the Petitioner the com-

positive advantage over persons engaged in similar business activities which exemption or immunity from the taxes at issue here would bring.

II

THE TAXES IMPOSED UPON PETITIONER DO NOT INTERFERE WITH ITS RIGHT TO SELF-GOVERNMENT

The Bureau of Revenue recognizes that if the imposition of the taxes at issue here interferes with the Tribe's right to reservation self-government, the tax must fail. See *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); *Williams v. Lee*, 358 U.S. 217 (1961). However, in this case, there are no facts showing such interference with the Tribe's right to reservation self-government.

Petitioner's contentions that the effect of the New Mexico Court of Appeals' decision is to restrict its choice of business ventures and limit its revenue raising projects are unsupported by the record.

Even if the Tribe decided to confine its business activity to its reservation, there is no indication that the influence state taxation could have on this decision would be an interference with the Tribal right of self-government.

In *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), it was recognized that fishing rights are of vital importance to Indians in Alaska. (369 U.S. 60, 6[illegible]). It is reasonable to assume that the revenue raised from fishing made these rights important and that this revenue would be used for the educational, social, and economic welfare of the Organized Village of Kake and the Aragon Community Association. Even though these facts can be reasonably inferred from the opinion, it was decided that state regulation of off-reserva-

tion fishing rights did not impinge upon treaty-protected reservation self-government.

The Respondents also contend that the off-reservation business activity of the Petitioner, which resulted in the imposition of the taxes at issue here, was not a governmental function of the Tribe. It was a proprietary function which state courts have, in tax cases, considered as resulting in taxable activity even though the entity upon whom the tax was imposed was a governmental unit. See *City of High Point v. Duke Power Company*, 120 F.2d 666 (4th Cir. 1941); *State Tax Commission v. City of Logan*, 88 Utah 406, 54 P.2d 1197 (1936); *City of Phoenix v. State*, 53 Ariz. 28, 85 P.2d 56 (1938). See also *City of Chanute v. State Tax Commission*, 156 Kan. 538, 134 P.2d 672 (1943); R. Ransom and W. Gilstrap, *Indians-Civil Jurisdiction in New Mexico-State, Federal and Tribal Courts*, 1 N.M. Law Rev. 196, 207-208 (1971).

The power to tax should not be crippled by extending the concept of interference with Tribal reservation self-government to situations where there is only remote, if any, influence upon the exercise of the functions of government. Compare *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342, 361 (1949).

III

THE PETITIONER IS NOT A FEDERAL INSTRUMENTALITY

The fact that the Tribe's ski resort is financed with money borrowed from the United States and that its operation is supervised to some degree by the Department of the Interior of the United States does not cause it to be virtually an arm of the United States Government. See dissenting opinion of Justice Marshall in *Agricultural National Bank v. State Tax*

Commission, 392 U.S. 339 (1968), and cases cited therein. The ski resort is not essential to the performance of government functions, as has previously been argued under Point II and even if the ski resort is considered a federal instrumentality, its immunity from taxation is removed because of the provisions of the New Mexico Enabling Act, as has previously been argued under Point I.

Petitioner's argument and the arguments presented by *Amicus Curiae* Native American Rights Fund and *Amicus Curiae* Association of American Indian Affairs, et al., seem to be premised on the assumption that the Petitioner was acting as a virtual ward of the government in engaging in the off-reservation business activities which resulted in the imposition of the tax at issue here. If this is the situation, then where is the tribal sovereignty and self-government which Petitioner so strongly urges under Point II? Respondents contend that Petitioner cannot be and is not both sovereign and federal instrumentality. Petitioner is not a federal instrumentality.

In *Leahy v. State Treasurer of Oklahoma*, 297 U.S. [illegible] (1936), it was decided that Oklahoma's taxation of income received by a member of an Indian Tribe as his share of the income from mineral resources of the Tribe, which the member was free to use as he saw fit, did not amount to state taxation of a federal instrumentality.

The Petitioner here is, of course, not an individual member of an Indian Tribe; however, the *Leahy* case can indicate a limit to the federal instrumentality doctrine described in *Federal Indian Law* 846-848 (U.S. Government Printing Office 1958). This doctrine appears to apply to lands and proceeds from

lands and is similar to the restrictions placed upon taxation of allotted lands. At pages 852 and 853 of *Federal Indian Law*, U.S. Government Printing Office (1958), the following paragraph is found:

> "It is to be noted, however that in the cases overruled the taxes were levied on private individuals or corporations organized for profit and which were only incidentally performing a Federal function. A distinction may be drawn between these cases, and cases involving a corporation organized solely to carry out *governmental objectives*, such as the tribal corporations organized under the Indian Reorganization Act of June 18, 1934, and it is probable that an attempt by a state to impose income or other types of taxes on such business organizations would still be held a direct burden on a Federal instrumentality." (emphasis supplied)

The case cited in support of this statement is *Clallam County v. United States*, 263 U.S. 341 (1923). That case concerned a corporation formed under a federal statute to purchase, produce, and manufacture aircraft in order to engage in World War I. The Court stated:

> ". . . This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account. The incorporation and formal erection of a new personality was *only* for the convenience of the United States to carry out its ends . . ." (emphasis supplied) (263 U.S. 341, 345).

It might be assumed that because of the fact that the loan to Petitioner was pursuant to 25 U.S.C. § 470, which provides for loans to "Indian chartered corporations", Petitioner was an Indian chartered cor-

poration formed pursuant to 25 U.S.C. § 477. If this assumption is made the fact still remains that the operation of the ski resort was not "only" for the convenience of the United States. It was for the benefit of the Mescalero Apache people. (App. 3 and 4). Therefore, the *Clallum County* case does not support the proposition that Appellant is a federal instrumentality.

Petitioner does not perform functions similar to or enjoy the same status with respect to federal statutes as did the Red Cross in *Department of Employment v. United States,* 385 U.S. 355 (1966). Petitioner is not a federal instrumentality and immune from the taxes imposed upon it merely because its activities may be useful to the federal government. Compare *Boeing Company v. Omdahl,* 169 N.W.2d 696 (N.D. 1969); *Laurens Fed. S. & L. Ass'n v. South Carolina Tax Commission,* 236 S.C. 2, 112 S.E.2d 716 (1960).

The *dissenting* opinion in *Agricultural Nat. Bank v. Tax Commission,* 392 U.S. 339 (1968), sets out several tests to determine if an institution or individual is a tax immune federal instrumentality, after noting that there is no simple test for making this determination and citing *Department of Employment v. United States, supra.* Justice Marshall, for the dissenters, states these tests as applied to the institutions or individuals are:

> ". . . whether they 'have become so incorporated into the government structure as to become instrumentalities of the United States and thus enjoy governmental immunity, '. . .; whether they 'are arms of the Government deemed by it essential for the performance of governmental functions,' and 'are integral parts of [a government department and] . . . share in fulfilling the duties en-

> trusted to it,' . . . ; whether they have been 'so assimilated by the Government as to become one of its constituent parts,' . . . and whether the institution is regarded 'virtually as an arm of the Government,' . . ." (Citations omitted) (392 U.S. 339, 353).

Respondents submit that Petitioner does not meet any of these general tests.

The United States does business with a vast number of private parties and the trend has been to reject immunizing these private parties from nondiscriminatory state taxes as a matter of constitutional law. See *United States v. City of Detroit,* 355 U.S. 466, 474 (1958). To exempt or immunize Petitioner from the taxes at issue here would be to turn away from that trend and could result in serious economic problems for the State of New Mexico as a result of the otherwise welcome expansion of Indian business activities.

CONCLUSION

The federal policy of fostering economic development of the American Indian demonstrated in this case is similar to federal policies fostering the development of small businesses. 15 U.S.C. § 631 et seq. Similar programs have also been initiated to aid small farmers and others whose economic development the United States wishes to foster. The fact that entities or persons participate in these programs does not automatically exempt or immunize them from state taxes. If this were so, then the tax base for the states would be severely restricted.

Historically the State of New Mexico has had a very broad based gross receipts tax. See N.M. Laws of 1939, Chapter 73. This type of tax provides significant ad-

vantages for both the state and the taxpaying citizens of the state. See generally J. F. Due, *State and Local Sales Taxation* 89-91, Public Administration Service (1971). The potential restriction of that tax base presented by Petitioner's and *Amicus Curiae* arguments would result in seriously jeopardizing the ability of the State of New Mexico to serve all its citizens. The restrictions is not warranted by either the facts or the law in this case.

For the reasons stated, it is respectfully submitted that the Judgment of the Court of Appeals of the State of New Mexico should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-738

THE MESCALERO APACHE TRIBE,

Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,

Respondents.

WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF OF MONTANA INTER-TRIBAL POLICY BOARD AS *AMICUS CURIAE*

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WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF OF MONTANA INTER-TRIBAL POLICY BOARD AS *AMICUS CURIAE*

The Montana Inter-Tribal Policy Board, as *amicus curiae,* submits this brief on behalf of all Montana Indians. Petitioner and Respondents have stipulated by written consent to the filing of this brief, which consent has been filed with the Clerk of the Court.

Interest of *Amicus Curiae*

The Montana Inter-Tribal Policy Board represents approximately 27,000 Indians living in the State of Montana. About 20,000 Indians live on or near the seven Montana Indian Reservations which contain the following Indian

tribes: Arapahoe, Assiniboine, Blackfeet, Chippewa, Cree, Crow, Flathead, Gros Ventre, Northern Cheyenne, and Sioux.

Most of these tribes, like Petitioner, The Mescalero Apache Tribe, have retained their customs, laws and tribal government, are organized pursuant to the Indian Reorganization Act of 1934,[1] and are currently expanding their governmental functions. These Montana tribes provide their members with governmental administration and services, including: civil and criminal courts; health, education, and welfare programs; and capital improvements. These activities require that the tribes raise substantial revenue from their own limited financial resources and those of their members.

New Mexico's assertion that it has power to tax a tribal enterprise poses a direct threat to the viability of tribal self-government in Montana as well as in New Mexico. The Montana tribes have also organized tribal enterprises for the purpose of increasing opportunities for Indians to become self-supporting and to provide revenue for the tribe itself. These enterprises include agricultural and livestock cooperatives as well as craft organizations for the sale of Indian handicraft products.

The Montana Indian tribes have protective treaties with the federal government similar to those of the Mescalero Apache Tribe.[2] The enabling acts of New Mexico and Mon-

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[1] 25 U.S.C. § 476.

[2] *Compare* the Apache Treaty of 1852 (10 Stat. 979) *with* the Navajo Treaty of 1868 (15 Stat. 667) and the Treaty with the Crow Indians 1868 (15 Stat. 649). See generally *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 346 n.4, 347-48 (1941) and *Mellakatla Indian Community* v. *Egan*, 369 U.S. 45, 52 (1962).

tana have identical disclaimer provisions leaving Indian lands "under the absolute jurisdiction and control"[3] of the United States, and very similar provisions allowing the states to tax "any Indian" off the reservation.

A decision upholding New Mexico's tax levy might authorize Montana to tax the business ventures of the tribes represented by the Montana Inter-Tribal Policy Board. Such taxation would effectively destroy the residual aboriginal right of these tribes to make and be governed by their own laws, a result that contravenes the applicable treaties with the United States government and acts of Congress.

The States of Montana and New Mexico have only minimal responsibility for Indians. With only one minor exception,[4] neither state has the responsibility of civil or criminal jurisdiction over Indians on reservations within their borders. It is submitted that where a state imposes taxes on Indians or Indian tribes when it does not have, nor has Congress or the Indians themselves put upon them, corresponding responsibilities for the well being of these Indians, it is grossly unfair and in violation of the due process rights guaranteed Indians by the Fourteenth Amendment to the United States Constitution.

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[3] *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 68 (1962), notes this identical language.

[4] The exception is Montana's exercise of criminal and some civil jurisdiction on the Flathead Reservation where some 80 percent of the residents are non-Indians. See *State ex rel. McDonald* v. *District Court*, —— Mont. ——, 496 P.2d 78 (1972), and *Kennerly* v. *District Court of Montana*, 400 U.S. 423, 425 (1971).

Summary of Argument

I. State taxation of self-governing Indian tribes is precluded by the residual aboriginal sovereignty of those tribes where such sovereignty is recognized by treaty between the Indian tribes and the federal government, has not been relinquished by the tribe, and has not been modified by act of Congress. The sovereignty of the Mescalero Apache Tribe was guaranteed to it by the Apache Treaty of 1852 (10 Stat. 979), and has never been relinquished or abandoned by the Tribe. Subsequent acts of Congress have not significantly modified the rights to sovereignty guaranteed by this treaty. A state's direct taxation of a tribe severely jeopardizes the continued viability of its treaty-guaranteed sovereignty by directly reducing the income and resources available to finance tribal governmental functions.

II. Due process of the law prevents states from levying taxes upon entities for whom it has accepted only minimal governmental responsibilities.

ARGUMENT

I.

State taxation of self-governing Indian tribes is precluded by the aboriginal sovereignty of those tribes where such sovereignty is recognized by treaty, not abandoned by the Indians, and not modified by act of Congress.

A. *Where the Aboriginal Internal Sovereignty Rights of Indian Tribes Are Protected by Treaty With the Federal Government, Such Rights May Be Modified Only by Congressional Act or by Consent of the Indians Themselves.*

As "Native Americans," Indian tribes enjoyed the aboriginal status of completely sovereign nations.[5] They relinquished their sovereignty to the federal government only to the extent provided by treaty. The scope of such relinquishment can be expanded only by subsequent act of Congress, or by the Indians' consensual abandonment of such rights. Federal treaties with the Indians recognized and protected the Indians' pre-existing internal tribal sovereignty,[6] and the Indian tribes that became parties to

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[5] *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832): "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights . . . from time immemorial."

[6] See F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1942) (U. New Mexico Press reprint 1971) 122 [hereinafter cited as COHEN]: "Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*" (Emphasis in original).

such treaties accordingly assumed the status of dependent, self-governing "nations."[7]

Thus, in the landmark decision of *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), Chief Justice Marshall stated of the "Cherokee Nation":

> The Cherokee nation, then, is a distinct community, occupying its own territory, . . . in which the laws of Georgia can have no force . . .
>
> * * *
>
> [The Georgia laws asserting jurisdiction over a non-Indian in the Cherokee domain] interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the government of the Union. They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognise the pre-existing power of the nation to govern itself.
>
> They are in hostility with the acts of Congress for regulating this intercourse, and giving effect to the treaties.[8]

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[7] *Worcester* v. *Georgia*, 31 U.S. at 559-60: "We have applied them [the words "treaty" and "nation"] to Indians, as we have applied them to other nations of the earth; they are applied to all in the same sense . . ." See also, Comment, *Indian Taxation: Underlying Policies and Present Problems*, 59 CALIF. L. REV. 1261, 1264-66 (1971); and COHEN at 33-34: "That Treaties with Indian tribes are of the same dignity as treaties with foreign nations is a view that has been repeatedly confirmed by the federal courts and never successfully challenged."

[8] The principles of *Worcester* v. *Georgia* were held applicable to New Mexico Indians in *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 345-348 (1941).

The importance of this decision is its holding that the original treaty guaranties of the Indian tribes' right to be self-governing are absolute—*beyond State control under the Constitution*[9]—unless Congress, by subsequent treaty, or statute under its plenary power over Indians,[10] revises these treaty obligations. These treaty rights were reaffirmed in *Williams* v. *Lee,* 358 U.S. 217 (1959), which held that Navajo sovereignty recognized by the Treaty of 1868 was "infringed" by allowing a non-Indian residing on the Reservation to bring suit against a member of the Navajo Tribe in the Arizona civil courts, rather than the Navajo tribal courts. This Court stated:

> Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester* v. *Georgia,* was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed. . . . [11]

358 U.S. at 221. Accord: *United States* v. *Kagama,* 118 U.S. 375 (1886); *Ex parte Crow Dog,* 109 U.S. 556 (1883).

A state cannot, therefore, unilaterally assume jurisdiction over a treaty-protected, sovereign Indian tribe, even

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[9] The treaty power is contained in U.S. CONST. art. II, § 2, cl. 1. States are forbidden from entering into treaties by U.S. CONST. art. I, § 10, cl. 1. Federal treaties are binding on the states under U.S. CONST. art. VI, cl. 2: ". . . all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . ."

[10] Congress retains plenary power over the Indians under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3: "To regulate commerce . . . with the Indian Tribes." See *Williams* v. *Lee,* 355 U.S. 214, 219 n. 4. (1959)

[11] It has been noted that federal policy toward the Indians in New Mexico and Arizona is comparable. See *United States* v. *Santa Fe Pacific R. Co.,* 314 U.S. 339, 346 (1941).

where the state has extended some measure of rights and privileges to the tribe. Any state statute which conflicts with the federal treaty protection of the residual right to tribal sovereignty is void under the Supremacy Clause (U.S. Const. art. VI, cl. 2). State jurisdiction can be obtained only by alteration of the treaty, by the Indians' abandonment of the right to tribal self-government, or by act of Congress:

> Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and laws of Congress, and their property is withdrawn from operation of State laws.

The Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1866).

B. *Indian Tribes Who Have Retained Their Tribal Organization and Government Have Not Abandoned Their Aboriginal Sovereignty So as to Permit the Exercise of State Jurisdiction.*

States are totally precluded from jurisdiction over Indian tribes in any area where the Indians have retained their tribal sovereignty. Only where the right to tribal self-government has been abandoned by individual Indians or by a particular tribe and where the state has assumed full responsibility for such Indians may the state exercise jurisdiction over them.[12] Such was the case of the Oklahoma

[12] Even in these circumstances, such jurisdiction can be precluded by act of Congress. See *Metlakatla Indian Community* v. *Egan*, 369 U.S. 45 (1962).

Indians in *Leahy* v. *State Treasurer of Oklahoma,* 297 U.S. 420 (1936), which sustained a state tax on an Indian's share of his tribe's mineral resource income, and in *Oklahoma Tax Commission* v. *United States,* 319 U.S. 598 (1943), which upheld application of the Oklahoma inheritance tax to the estate of an Indian. In *Oklahoma Tax Commission,* Justice Black, writing for the Court, discussed *Worcester* v. *Georgia* and its progeny and stated:

> The underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in *Worcester* v. *Georgia, supra;* and, unlike the Indians involved in *The Kansas Indians* case, *supra,* they are actually citizens of the State with little to distinguish them from all other citizens. . . . (319 U.S. at 603).

In *Organized Village of Kake* v. *Egan,* 369 U.S. 60 (1962), where state jurisdiction over Indians was sustained, there were facts showing that the Southeastern Alaskan Indians lacked the essential treaty-protected internal sovereignty: 1) the Indians had no formal treaty rights and no reservation; 2) Alaska had both civil and criminal jurisdiction over the Indians; and, as stated in the companion case of *Metlakatla Indian Community* v. *Egan,* 369 U.S. 45, 50-51 (1962), 3) these Indians had "substantially adopted and been adopted by the white man's civilization" and were not subject to "the principle of Indian national sovereignty enunciated in *Worcester* v. *Georgia.*"

Neither the Mescalero Apache Tribe nor the Montana tribes represented by *amicus curiae* have so abrogated their treaty rights to tribal sovereignty.

The Mescalero Apache Tribe has not abrogated its treaty-protected sovereign immunity from taxation even if this Court finds that it is "incorporated" pursuant to 25 U.S.C. §§ 477 and 470.[13] To do so would contradict the whole policy of the Indian Reorganization Act of 1934[14] of which these provisions are a part. The dual goals of this Act were to develop tribal self-government and encourage economic self-development. If compliance with the Act would cause a tribe to lose its sovereign immunity from taxation, the resulting direct reduction of revenue available to the tribe to perform its essential governmental functions would be a serious infringement of tribal sovereignty. The economic burdens of such a tax on the tribe would also hinder the related goal of encouraging economic self-development.

It is clear that the Mescalero Apache Tribe is in substance operating as a sovereign tribe and not as a business corporation. As stated in the "Stipulation of Fact"[15] under which the case was tried in the lower courts:

> 4. Sierra Blanca Ski Enterprises . . . is exclusively owned and operated by the Tribe. . . .
>
> * * *
>
> 6. The basic purpose of the ski resort is to provide revenue to the Tribe in lieu of raising revenue through the taxation of Tribal members or in some other manner. The revenue from the ski resort is

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[13] See *Mescalero Apache Tribe* v. *Jones*, 83 N.M. 158, 489 P.2d 666, 671 (Ct. App. 1971) (concurring opinion).

[14] 25 U.S.C. §§ 461-479.

[15] Appendix to *Memorandum for the United States as Amicus Curiae*, p. 12.

to be used and is being used for the educational, social, and economic welfare of the Mescalero Apache people. . . .

Finally it would be an absurd and cruel result if the tax exemption of Indian tribes were interpreted to apply only to activities on the reservations. Many of the nation's Indians were restricted to economically unviable lands—largely those unwanted by the white man—as reservations. To effectively restrict their tax immunity to such areas would compound this injustice, and serve to shackle the tribes to such lands forever.

C. ***Subsequent Congressional Acts Have Not Significantly Modified the Right to Self-Government Guaranteed to Indian Tribes by Treaty.***

Since the Mescalero Apache Tribe has not consented to New Mexico's assertion of tax jurisdiction nor have they abandoned or relinquished their treaty-guaranteed rights of self-government, the question remains whether these rights have been modified by act of Congress so as to permit such assertion of jurisdiction by the state.

Congress did not modify these rights when New Mexico was admitted to the Union. The New Mexico Enabling Act, which the Court of Appeals of New Mexico interpreted as "a specific grant of power" by which the "Federal Government permitted the State of New Mexico to tax [the Mescalero Apache Tribe]," [18] is clearly not a grant of power to tax land or property of an "Indian tribe." The relevant portion of the Enabling Act reads:

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[18] *Mescalero Apache Tribe* v. *Jones*, 83 N.M. 158, 161, 489 P.2d [illegible] (Ct. App. 1971).

> Sec. 20 . . . Second . . . [B]ut nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed any land and other property outside of an Indian reservation owned or held by *any Indian*, save and except such lands as have granted or acquired as aforesaid or as may be granted or confirmed to *any Indian or Indians* under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereinafter prescribe. [Emphasis supplied][17]

While the Enabling Act recognizes New Mexico's jurisdiction to tax individual Indians outside the sphere of treaty-protected tribal sovereignty,[18] it does not extend such jurisdiction to "Indian tribes," since "Indian tribes" are clearly not included in the term "any Indian." Where Congress meant "any Indian *or Indian Tribe*" in this section, it specifically stated so:

> Sec. 20 . . . Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by *any Indian or Indian Tribes*, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such *Indian or Indian tribes* shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; . . . [Emphasis supplied][19]

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[17] 36 Stat. 557, 569-70 (1910).

[18] See discussion of Oklahoma and Alaska Indians, *supra*, pp. 8-9.

[19] 36 Stat. 557, 569 (1910).

The Enabling Act should not be construed contrary to its explicit language to grant state tax jurisdiction over sovereign Indian tribes.[20]

Congress has occasionally employed its plenary power under the Commerce Clause to modify areas of traditional Indian tribal sovereignty and to extend to the states jurisdiction over Indian affairs. But without exception, such legislation has been specific and limited. For example, 25 U.S.C. § 398 represents a rare instance of congressional authorization of state taxation of land or other property within the sphere of tribal government. That statute permitted the states to tax mineral leaseholds on unallotted Indian land, but the grant of jurisdiction was carefully limited to provide that "such tax shall not become a lien or charge of any kind or character against the property of the Indian owner."[21]

As a result of this legislative pattern, federal statutes allowing states to assume some form of civil or criminal jurisdiction over Indian tribes have been strictly construed against the states. *Kennerly* v. *District Court of Montana*, 400 U.S. 423 (1971). In *Kennerly* this Court noted the specificity used when Congress granted to the states civil and criminal jurisdiction over Indians:

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[20] Furthermore, the Mescalero Apache Tribe is exempted from the New Mexico tax since the lands acquired, and their proceeds, are specifically exempted by 25 U.S.C. § 465. See *Memorandum for the United States as Amicus Curiae*, p. 7.

[21] See also 25 U.S.C. § 231, allowing state health inspections and enforcement of compulsory school attendance laws on Indian land, the latter, however, only if the tribe consents; and 18 U.S.C. § 1161 permitting the application of state laws dealing with the sale and possession of intoxicants, again, only if there is consent of the tribe.

> The statute [Section 4 of the Act of August 15, 1953, 67 Stat. 588] is illustrative of the detailed regulatory scrutiny which Congress has traditionally brought to bear on the extension of state jurisdiction, whether civil or criminal, to actions to which Indians are parties arising in Indian country. (400 U.S. at 421 n.1.)

The New Mexico Enabling Act should be likewise strictly construed against granting jurisdiction over Indian tribes and abrogating their treaty-protected sovereign immunity.

D. *The Continuing Viability of Tribal Sovereignty Would Be Severely Jeopardized by State Taxation of a Tribe.*

Indian tribes are "distinct independent political communities," [22] retaining all of the necessary powers for internal self-government derived from their aboriginal tribal sovereignty. These powers include, of course, the power to tax or otherwise raise revenues to provide necessary governmental services.

The federal government has consistently pursued a policy designed to secure viable self-government for the Indian tribes. Both the Indian Reorganization Act of 1934,[23] and Title IV of the Civil Rights Act of 1968[24] specifically provide for protection and development of the Indian tribes' right of self-government. Congress has further declared:

> [O]ur national policy shall give full recognition to and be predicated upon the unique relationship that exists between this group of citizens and the Federal Government. . . .
>
> . . . [I]mproving the quality and quantity of social and economic development efforts for Indian people and

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[22] *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

[23] 25 U.S.C. §§ 461-479.

[24] 25 U.S.C. §§ 1321-1326.

maximizing opportunities for Indian control and self-determination shall be a major goal of our national Indian policy.

Senate Concurrent Resolution 26, December 11, 1971, 117 Cong. Rec. 21325-26 (daily ed. Dec. 11, 1971).

As Chief Justice Marshall stated: "[T]he power of taxing the people and their property is essential to the very existence of government. . . ."[25] If the Indian self-government guaranteed by treaties and acts of Congress is to be a reality, Indians must have effective power to raise the revenue necessary to support governmental functions. The severe economic poverty on most Indian reservations creates a meager tax base. To restrict Indian tribes' immunity from taxation to this meager tax base will seriously impinge on the American Indians' efforts toward self-improvement and self-government. Such taxation would effectively destroy the "choice" of self-government offered the Indians by treaty and under the Indian Reorganization Act of 1934,[26] and would eviscerate the Indians' right to administer the enforcement of their own tribal civil and criminal laws as recognized in Section IV of the Civil Rights Act of 1968.[27]

Clearly, state taxation of sovereign Indian tribes, contrary to the holding of the New Mexico Court of Appeals below, does significantly interfere with Indian self-government. Respondents' contention that the taxes imposed are an interference with a proprietary function rather than a governmental function (Respondents' Brief p. 14), completely ignores the stipulated fact that the operation of the

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[25] *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819).

[26] 25 U.S.C. §§ 461-479.

[27] 25 U.S.C. §§ 1321-1326.

ski resort was to provide revenue to the Tribe *in lieu of taxation* of Tribal members.[28]

II.

Due process of the law prevents states from levying taxes upon Indian tribes for whom it has only minimal governmental responsibilities.

Amicus Curiae contends that a state should not have jurisdiction to tax Indian tribes to whom it provides only minimal governmental services. The argument draws support from the proposition, discussed above, that where a tribe continues to govern its members and provide traditional governmental services, the states may not exercise conflicting jurisdiction. In *Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685, 691 (1965), Justice Black compared in detail the nature of the governmental services provided to the Indians by the state and those provided by the tribe with assistance of the federal government, concluding:

> [S]ince federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.

Even where a state's power to tax Indians or Indian tribes has been sustained, as in *Oklahoma Tax Commission* v. *United States,* 319 U.S. 598 (1942), this court has stressed that the nature and quantity of governmental services received by Indians from the State, and the failure of the

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[28] Stipulation of Fact, No. 6. Appendix to *Memorandum for the United States as Amicus Curiae,* p. 12.

Indian tribes to provide such services, were critical factors in determining whether the State might "reasonably" levy a tax. Speaking of the Oklahoma Indians, Justice Black noted:

> Oklahoma supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. (319 U.S. at 608-609)

A state's lack of power to tax self-governing Indian tribes, such as the Mescalero Apache Tribe of New Mexico and the several tribes of Montana, may be further demonstrated by analogy to a state's lack of power to tax a foreign entity. In the leading case of *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435 (1940), this Court noted that such power is subject to the due process requirements of the Fourteenth Amendment,[29] and that consequently due process requires that the power to tax bear some relation to the protection, services, and benefits conferred by the state upon the taxed entity.

> "Taxable event," "jurisdiction to tax," "business situs," "extraterritoriality," are all compendious ways of implying the impotence of state power because

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[29] Indians were made citizens of the United States for purposes of the Fourteenth Amendment by the Citizenship Act of 1924, 43 Stat. 253, *as amended*, 8 U.S.C. § 1401.

> (a) the following shall be nationals and citizens of the United States at birth:
>
> * * *
>
> (2) a person born in the United States to a member of an Indian, Eskimo, Aleutian or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property; . . .

See Cohen at 153, 179.

> state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. *The simple but controlling question is whether the state has given anything for which it can ask return.* (311 U.S. at 444) (emphasis supplied).

This test was reaffirmed as recently as 1967 in *National Bellas Hess, Inc.* v. *Dep't of Revenue,* 386 U.S. 753, 756 (1967). See also *General Motors Corp.* v. *Washington,* 377 U.S. 436, 441 (1964); *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 465 (1959); *International Harvester Co.* v. *Dep't of Taxation,* 322 U.S. 435, 442 (1943); and *Porto Rico Telephone Co.* v. *Descartes,* 255 F.2d 169, 175 (1st Cir. 1958).

In *National Bellas Hess, supra,* the State of Illinois was prohibited from imposing the duty of use tax collection and payment upon an out of state, mail-order seller. The minimal benefits provided by Illinois to the seller in that case, such as the use of banking and credit facilities and access to Illinois courts,[30] were not considered sufficient to justify the imposition of the tax on the foreign entity.

The services provided to the Mescalero Apache Tribe and its members by the State of New Mexico are minimal compared to those provided by the Mescalero Apaches themselves, by the federal government either directly or by

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[30] 386 U.S. at 762 (Fortas, J. dissenting).

its reimbursement of state expenditures.[31] The Mescalero Apaches, like the Montana tribes, provide their own executive administration, police force, tribal courts—both civil and criminal, educational programs and health programs. The Mescalero Apache Tribe has adopted a constitution and is a viable, functioning Indian tribe performing governmental functions under its constitution, tribal ordinances and applicable federal statutes. The Mescalero Apache court system relieves the state of significant costs in its administration of justice. Roads on the reservation are maintained by the Tribe and the Bureau of Indian Affairs. State schools which serve Indians are subsidized by the federal government.[32]

It is submitted that, just as a state may not constitutionally tax a foreign entity to which it furnishes only minimal services, due process of the law prevents it from taxing sovereign Indian tribes within its borders to whom it furnishes only minimal services, without violating due process of law.

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[31] See *inter alia*, 20 U.S.C. §§ 631 *et seq.* (school aid in federally impacted area); 25 U.S.C. § 318(a) (reservation roads); 25 U.S.C. § 452 (educational, medical, social programs); 25 U.S.C. § 639 (welfare programs); 42 U.S.C. § 2002 (health service program); 25 C.F.R. § 33.4 (education).

[32] The gross receipts tax imposed by New Mexico was intended as a means of raising money for public school education, yet the federal government now meets the bulk of the cost of educating the Indians. See Petitioners' brief, p. 29.

CONCLUSION

For the foregoing reasons the judgment of the [illegible] of Appeals of New Mexico should be reversed.

Respectfully submitted,

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CITATIONS

...—1

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-738

THE MESCALERO APACHE TRIBE, PETITIONER

v.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The order of the Supreme Court of the State of New Mexico denying certiorari to the Court of Appeals of New Mexico is reported at 83 N.M. 161. The opinion of the New Mexico Court of Appeals (App. 62-77) is reported at 83 N.M. 158.

JURISDICTION

After denial of certiorari by the Supreme Court of New Mexico on October 6, 1971, the Court of Appeals of New Mexico entered final judgment on October 8, 1971 (App. 88). A petition for a writ of certiorari was filed with this Court on December 4, 1971, and was granted on April 24, 1972. This Court's jurisdiction rests on 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the State of New Mexico may lawfully tax the petitioner Tribe's gross receipts from a winter sports and resort facility financed by the federal government and operated by the Tribe partially on its reservation land but principally on contiguous land owned by the United States and made available to the Tribe by the United States for the Tribe's use for a period of thirty years.

2. Whether the State of New Mexico has authority to impose a tax on personal property owned by the Tribe and used in the operation of the same facility.

STATUTES INVOLVED

25 U.S.C. 465 provides in relevant part:

> *Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption.*
>
> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> * * * * *
>
> Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, *and*

such lands or rights shall be exempt from State and local taxation. [Emphasis supplied.]

25 U.S.C. 470 reads as follows:

> There is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $20,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established.

25 U.S.C. 476 reads as follows:

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws * * *. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.
>
> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in

such tribe or its tribal council the following rights and powers: * * * to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Section 2, cl. 2, of the Enabling Act for New Mexico of June 20, 1910, 36 Stat. 557, provides in pertinent part:

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; * * * that no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein or in the ordinance herein provided for, shall preclude the said State from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or

confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe.

The revenue statutes of the State of New Mexico provide in pertinent parts:

> 72-16-4.10. *Privilege taxes—Business services.*—The tax shall be computed at an amount equal to two per cent [2%] of the gross receipts of any person engaging or continuing in any of the following or similar businesses: * * * hotels, camp grounds, rooming and boarding houses, bath and bath houses, restaurants, * * * and any other business in which services (not professional) are performed on a price or fee basis * * *.
>
> 72-17-3. *Tax on tangible personal property stored, used or consumed in state.*—An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased from a retailer on or after July 1, 1939, and stored, used or consumed in this state at the rate of two per cent [2%] of the sales price of such property; * * *.

INTEREST OF THE UNITED STATES

In order to foster Indian economic development, Congress, in 25 U.S.C. 465, authorized the United States to obtain additional lands for the use of Indian tribes and specified that such lands shall be exempt from state and local taxation. State taxation of the Indians' utilization of such lands is of concern to the

United States because of its adverse effect on accomplishment of the federal statutory purpose.

STATEMENT

This is an action by the Mescalero Apache Tribe of Indians protesting the assessment of certain taxes by the State of New Mexico and seeking a refund. The taxes affect a ski resort owned and operated by the Tribe partially on its original reservation land but principally in the Lincoln National Forest under a special-use permit issued by the United States Forest Service. The project is financed by the United States pursuant to 25 U.S.C. 470. The enterprise is designed to provide revenue for the Tribe and job training for approximately 25 tribal members (App. 3–4, Stipulation No. 6).

From October 1, 1963, through December 31, 1966, the Tribe paid under protest $26,086.47 in taxes to the State, based on the gross receipts received from the operation of the ski resort (App. 6, Stipulation 14). In addition, New Mexico assessed use taxes against the Tribe, based on the purchase price paid for materials used to build two ski lifts, in the amount of $5,887.19, plus approximately $1,500 in penalties and interest. The period covered by the use tax assessments extended from September 1, 1963, through April 30, 1968 (App. 4–5, Stipulation 9).

The New Mexico State Commissioner of Revenue denied a claim for refund and protest of assessment (App. 57–58). The Court of Appeals of the State of New Mexico affirmed (App. 62–71), holding essentially that the enterprise and property involved in

the case were not within an Indian reservation and thus under the New Mexico Enabling Act could be taxed by the State. The State Supreme Court denied certiorari (App. 88). Petitioner then filed a petition for a writ of certiorari in this Court, which granted the petition on April 24, 1972.

SUMMARY OF ARGUMENT

I

1. The Indian Reorganization Act of 1934 (the Wheeler Act) provided a legislative basis for the economic revitalization of Indian tribes after a period of tribal decline. As part of its plan, it provided a loan fund available for tribal enterprises and it authorized the Secretary of the Interior to acquire additional land or rights in land for the use of tribes. The Act further provided that lands acquired under the Act for the use of Indians would be exempt from state and local taxation. The Mescalero Apache Tribe was reorganized under the Act, it borrowed money under the Act for the present enterprise and the land here in question was made available to it under the authority of the Act. The Tribe consequently is entitled to the tax exemption provided by the Act. The fact that the land here was national forest land already owned by the federal government and was made available by it for the use of the Tribe, rather than land purchased in the name of the government for the use of the Tribe, is of no significance for purposes of the statutory tax exemption. Like all provisions granting tax immunities to Indians, this exemption provision should be liberally construed in favor of the immunity.

2. Nor does the New Mexico Enabling Act authorize the State to impose the taxes at issue here. That Act expressly recognizes that Congress may, as here, subsequently grant additional tax exemptions to Indians and, in any event, authorizes the State to tax only individual Indian holdings, and not tribal holdings, of land outside reservations.

II

1. The exemption from taxation of the land provided by 25 U.S.C. 465 extends by implication to taxation of the revenues produced directly by the Tribe's use of the land. In the exceptional circumstances where Congress has wished to permit state taxation of the proceeds derived by Indians from tribal land, it has done so by means of carefully delimited legislation. Here, to the contrary, Congress has provided only an exemption from taxation.

2. It has long been established that property used by individual Indians on tax exempt lands for the development of the lands is tax exempt. *A fortiori*, where, as here, the undertaking is by a Tribe in furtherance of a plan for economic betterment approved and fostered by the government as authorized by Congress, the use of such property is tax exempt in accordance with 25 U.S.C. 465.

ARGUMENT

I

THE LAND AND OTHER REAL PROPERTY UTILIZED BY THE TRIBE IN THE OPERATION OF ITS SKI RESORT ARE EXEMPT FROM STATE TAXATION UNDER 25 U.S.C. 465

The Indian Reorganization Act of 1934 (the Wheeler Act), 48 Stat. 984–988, 25 U.S.C. 461–479, marked a significant change in federal policy concerning Indian affairs. In the years since the passage of the General Allotment Act of 1887, 24 Stat. 388, under which Congress had tried to turn communal Indians into individual land owners and farmers, total Indian land holdings had decreased from 138,000,000 acres, to 48,000,000.[1] Much of the land the Indians lost was their most productive land. Some 150,000 tribal Indians were landless by 1933 and many tribes were destitute.[2] In addition to the loss of land and consequent increased Indian poverty, the purposeful attrition of tribal authority and structure had resulted in a growing Indian demoralization.

The Wheeler Act undertook to establish the legislative requisites for a revival of tribal enterprise and

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[1] Washburn, *Red Man's Land/White Man's Law*, p. 75; see also p. 47; *To grant to Indians living under Federal tutelage the freedom to organize for purposes of local self-government and economic enterprise*, U.S. Congress, Senate Committee on Indian Affairs, Hearings on S. 2755 and S. 3645, 73d Cong., 2d Sess., pp. 57–59, 271–276 (April 1934).

[2] Hearings, *supra*, note 1, p. 59.

a reversal of the trend of impoverishment.[8] To do so, it prohibited further allotment of Indian land, provided for tribal constitutions, encouraged tribal enterprise through loans to tribes, provided for acquisitions of land or rights in land for the use of tribes, and provided for exemption from state taxation of such land and rights in land. All of the statutory provisions at issue in this case were originally portions of that Act and should be interpreted in furtherance of the overall purposes of the Act.

The construction and operation of the ski resort at issue here are an example of the successful use of the tools for economic development provided by the Wheeler Act. The modern organization of the Mescalero Tribe was established in 1934 under Section 16 of the Wheeler Act, 25 U.S.C. 476 (App. 2–3, Stipulation 3). The Secretary of the Interior approved the Tribe's constitution as required by that Section (App. 13–40). The constitution incorporates the necessity for approval by the Secretary of the Interior of various acts of the Tribe but provides for tribal independence as to others (App. 28, Sec. 5). A feasibility study for the ski resort was made by the Bureau of Indian

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[8] See generally Haas, *The Legal Aspects of Indian Affairs from 1887 to 1957*, 311 Annals of the American Academy of Political and Social Science 13 (May 1957); Department of the Interior *Federal Indian Law* (Cohen, 1958 Rev.), pp. 127–133, 410–411.

Affairs and paid for by the United States (App. 3, Stipulation 5). Because the Tribe did not have capital needed to undertake the enterprise, a federal loan was arranged (App. 5, Stipulations 10, 11; see Section 10 of the Wheeler Act, 25 U.S.C. 470). And because the use of additional land was needed to undertake the enterprise, the government made additional land available for the use of the Tribe (App. 3, Stipulation 4; see Section 5 of the Wheeler Act, 25 U.S.C. 465). The resort was designed as a tribal activity to improve the Tribe's economic base and to provide employment for members of the Tribe (App. 3-4, Stipulation 6).

The New Mexico Court of Appeals in effect has held that because the federal government already owned land next to the Reservation and made it available to the Tribe, rather than purchasing new land to be held in trust by the United States for the Tribe, the Tribe is not entitled to the benefit of the tax exemption provided in the Wheeler Act, 25 U.S.C. 465. This construction, we submit, is incompatible with the congressional purpose in providing the tax exemption.

1. Because it recognized that many Indians and Indian tribes had inadequate land to provide for their economic well-being, Congress, in 25 U.S.C. 465, authorized the Secretary of the Interior to acquire ad-

ditional land for Indians or Indian tribes.* The provision is written with an obvious intent to allow land to be acquired in any practical way, rather than just through outright purchases of fee ownership. It states, "The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, *within or without* existing reservations * * * for the purpose of providing land for Indians" (emphasis supplied). The Section concludes by providing that title to such land or rights shall be taken in the name of the United States in trust for the Indian tribe (or individual Indian) "and such lands or rights shall be exempt from state and local taxation."

Under this statute, the United States unquestionably could have purchased for the Tribe taxable land (or an interest in such land) within the State of New

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*In the hearings on the bill John Collier, Commissioner of Indian Affairs, in response to a question by Senator Wheeler, Chairman of the Senate Committee on Indian Affairs, explained the necessity of acquiring land for the Indians and the necessity for innovation in the system of holding it as follows:

> * * * The bill authorizes an expenditure of 2 million a year on the purchase of land. That is not the only string we would have to our bow, but it is the most important string. * * * [W]e aim to consolidate the Indian holdings so there will be unbroken areas of Indian land which would then be held intact, and whether it be that they were rented or that they were used by Indians, could be rented or used efficiently. [Hearings, *supra*, note 1, pp. 59–60.]

Mexico, thereby removing such land from the State's tax rolls.* Instead, the United States here chose a method less expensive for both New Mexico and the United States. Lincoln National Forest had been taken from the public domain and made a national forest by Presidential proclamation in 1902, 32 Stat. 2018. When New Mexico became a State in 1910, its Enabling Act required the State to disclaim the right to tax such federal land (see p. 4, *supra*). Title to the National Forest is of course in the United States, and the State does not claim the right to tax national forest land. It was both logical and practical for the United States to grant the Tribe the use of a portion of the National Forest adjacent to the Reservation for the economic enterprise in question. And it would have been meaningless for the United States, which already had title to the forest, to convey title to itself for the use of the Tribe. By granting the Tribe a permit to use the forest for a specific economic purpose, the United States maintained title in itself and granted the Tribe the use of the land—the interest it needed

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*In fiscal year 1964, however, the Appropriation Act for the Department of the Interior prohibited the "acquisition of land within the States of * * * New Mexico * * * outside of the boundaries of existing Indian reservations." 77 Stat. 99. Presumably, this restriction reflected a congressional preference for utilizing land already tax exempt for accomplishing the purposes of the Wheeler Act. Compare the Appropriation Act for fiscal year 1965, which has no such restriction for New Mexico. 85 Stat. [illegible]

for the ski resort.[8] To attach to this rational behavior the consequence that the State can tax the right of use made available to the Tribe, though it can tax neither federal land nor land held by the government in fee for the use of Indian Tribes, would unjustifiably create a windfall to the State and deprive the Tribe of the immunity it clearly would have had if non-federal (previously taxable) land had been made available to it. Surely Congress intended no such anomalous result and, we submit, the tax exemption provision of the Wheeler Act should not be construed to permit it.

Indeed, this Court has consistently held that Indian tax immunity provisions should be liberally construed in favor of the immunity. As the court explained in *Choate* v. *Trapp*, 224 U.S. 665, 675, a case in which the State of Oklahoma urged that such an immunity provision should be narrowly construed:

> But in the Government's dealing with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without excep-

[8] The division of ownership interests between the United States and Indian tribes is not restricted to any one legal technique. It often takes the form of fee ownership in the United States and a beneficial use in the Tribe. See *Nadeau* v. *Union Pacific RR. Co.*, 253 U.S. 442, 445–446; *United States* v. *Cook*, 19 Wall. 591; *The Kansas Indians*, 5 Wall. 737. See generally *Federal Indian Law*, *supra*, at 590–592.

[illegible]tion, for more than a hundred years and has been applied in tax cases.

See, also, *Squire* v. *Capoeman*, 351 U.S. 1, 5–7; *Board of Commissioners* v. *Seber*, 318 U.S. 705, 718.

It is, therefore, our position that 25 U.S.C. 465, *supra*, properly construed in light of the foregoing principles and in furtherance of the specific purposes of the Wheeler Act, of which it is a part, grants immunity from state taxation of the Tribe's use of the national forest lands at issue here.

2. New Mexico argues, however, that its Enabling Act specifically authorizes it to tax this tribal enterprise because it is located outside the Reservation. We disagree for two reasons. First, the Enabling Act allows state taxation of "property outside of an Indian reservation owned or held by any Indian * * * *except * * * to such extent as Congress has prescribed or may hereafter prescribe*" (emphasis added; see pp. 4–5, *supra*). And, as we have just urged, in the Wheeler Act Congress has prescribed such an exemption.

Second, we believe that, especially when it is read in the context of the statute and its background, it is clear that the Enabling Act's proviso concerning land outside reservations was meant to refer only to individual holdings, and not to tribal holdings. In the last part of the same sentence Congress required New Mexico to disclaim title to unappropriated land held by any Indian or Indian tribes * * *." But the proviso allowing state taxation of land outside reservations unless Congress has provided to the contrary makes reference to Indian tribes and refers only to

holdings "by any Indian." That this was not inadvertent is strongly suggested by the state of the law at the time. Indian tribes were then without hesitation considered to be federal instrumentalities whose property could not constitutionally be taxed by the states. See, *e.g.*, *Choctaw & Gulf RR.* v. *Harrison*, 235 U.S. 292; *Indian Oil Co.* v. *Oklahoma*, 240 U.S. 522. Accordingly, in New Mexico's Enabling Act Congress specified only that the State could tax the holdings of individual non-reservation Indians unless they were exempted from taxation by an Act of Congress; and there is no reason to believe that without saying so Congress also intended to permit state taxation of tribal property, which at that time was considered constitutionally barred.

We do not believe the Court need here decide whether Indian tribes should still be considered federal instrumentalities constitutionally immune from state taxation. Early cases considered both the tribes and their lessees exempt from state taxation of Indian land or income produced from such land. *Indian Oil Co.* v. *Oklahoma*, *supra*; *Gillespie* v. *Oklahoma*, 257 U.S. 501. The immunity from taxation of lessees of the government was overruled in *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376, but the immunity of the government itself, or of an organized Indian tribe, was not overruled. Thus, this Court in *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 603, in holding that individual Oklahoma Indians have no tax immunity as such, emphasized their lack of tribal organization and distinguished functioning tribes living on land held in

[illegible] *Indian Land*, *supra*, at 500-502.

trust. See also *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342, 353. *Federal Indian Law, supra* note 1, at 853, sums up the changes that have thus occurred in Indian law through the limitation of the federal instrumentality doctrine as follows:

> There seems little doubt in view of the foregoing that the validity, if not the scope, of the instrumentality doctrine, insofar as it relates to Indians, their property, and their affairs, remains unchanged. For just as the right to tax the lessee of State lands does not include the right to tax the State itself, so the right to tax the lessee of Indian lands does not imply a right to tax the Indians or their property.

If limited to organized tribes, this summary has considerable merit. In the present case, however, we believe the specific congressional grant of tax immunity in 25 U.S.C. 465 obviates any need for consideration of this broader issue.

II

THE EXEMPTION FROM STATE TAXATION OF LANDS OR RIGHTS IN LAND PROVIDED BY 25 U.S.C. 465 ALSO EXTENDS TO TAXATION OF REVENUES DERIVED FROM THE USE OF SUCH LANDS AND TO TAXATION OF THE TRIBE'S USE OF PROPERTY ON SUCH LANDS

If the Court agrees with our submission in point I, *supra*, that the Tribe's interest in the land and other realty here is exempt by federal statute from state taxation, the remaining questions are whether the exemption also extends to taxation of revenues derived by the Tribe from the use of the land and to taxation

of the Tribe's use of materials for construction of improvements on the land.

1. So far as we are able to determine, this case presents the first attempt by a State to tax an Indian tribe on revenues derived by the tribe from the use of tax-exempt tribally held lands. The fact that in the 38 years since the passage of the Wheeler Act no such case has arisen is itself some indication of an understanding that the income from tax-exempt tribal property cannot be taxed by the States. This understanding is corroborated by the apparent assurance in this Court's opinion in *Oklahoma Tax Commission* v. *Texas Co., supra,* 336 U.S. at 353, that the immunity of the tribe itself from state taxation of the production of tribal land remains though its non-Indian lessees henceforth could be taxed on such production.

Moreover, in a series of cases concerning federal income taxation, it has become well established that the income derived by Indians directly from use of Indian land which is itself tax exempt is not taxable (unless Congress has specifically authorized such taxation). See *Squire* v. *Capoeman, supra; United States* v. *Daney,* 370 F. 2d 791 (C.A. 10); *Big Eagle* v. *United States,* 300 F. 2d 765 (Ct. Cl.); *Stevens* v. *Commissioner,* 452 F. 2d 741 (C.A. 9). Indeed, in *Stevens,* though the government disputed whether certain tracts were tax exempt, it did not claim the right to tax income produced directly through the use of land that is tax exempt.

Where state taxation is concerned, because of the limited state responsibility for reservation Indians and the special protections granted the tribes by federal

treaties and statutes, there is even less reason to permit taxation of tribal income from tax exempt land. As the Wheeler Act recognized (see p. 9, *supra*), Indian property, if it is to be used effectively, must often be used communally as in the present tribal enterprise. A state tax on a tribal activity can thus siphon off revenues that would otherwise have accrued to tribal members, too poor to be taxed as individuals. It therefore remains important today, as in the nineteenth century (see pp. 13–14, *supra*), that tax exemptions of Indian tribes be interpreted liberally to achieve their purpose of reserving to the members of the tribe the benefits of such income as the tribe can produce. Accordingly, where, as here, the enterprise in question is on land made available to the Tribe by the federal government and the Tribe's course of conduct is approved and fostered by the government under the Wheeler Act, that Act's tax exemption provision should be interpreted broadly enough to effectuate the policy of the Act—namely, that the land provided by the United States for the Tribe's use serve as a tax-free base for the Tribe's economic support and well-being.

In the exceptional circumstances where Congress has wished to permit state taxation of the proceeds derived by Indians from tax exempt lands, it has done so by means of carefully delimited, specific legislation. For example, 25 U.S.C. 398 specifically authorizes the

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Moreover, since the tax here is on gross receipts rather than net income, its potential interference with the purpose of the Wheeler Act is accentuated, because it is not limited to profits but could require payment from the tribal treasury.

States to tax mineral production on unallotted tribal lands as if produced on unrestricted land, but only within the confines of safeguards specified in the federal statute. There is no such congressional authorization for the New Mexico taxes at issue here; to the contrary, Congress has provided tax exemption.

2. For similar reasons, we believe the federal statutory exemption applies also to the imposition here of New Mexico's use tax. Indeed, this Court has previously spoken on this subject. In *United States v. Rickert*, 188 U.S. 432, the State of South Dakota attempted to collect a tax on permanent improvements that individual Indians had placed on their allotted lands and on personal property used by the Indians in farming the land. In a suit brought by the United States to enjoin the collection of the tax, this Court held that even though South Dakota may not classify the improvements as part of the realty "[t]he fact remains that the improvements here in question are essentially a part of the lands, and their use by the Indians is necessary to effectuate the policy of the United States" 188 U.S. at 442. As to cattle, horses and other property of like character, the Court said (188 U.S. at 443–444):

> * * * The personal property in question was purchased with the money of the Government and was furnished to the Indians in order to maintain them on the land allotted during the period of the trust estate, and to induce them to adopt the habits of civilized life. It was, in fact, the property of the United States, and was put into the hands of the Indians to be

used in execution of the purpose of the Government in reference to them. The assessment and taxation of the personal property would necessarily have the effect to defeat that purpose.

As stated by the Solicitor of the Department of the Interior (quoted in *Federal Indian Law, supra* at 865):

> From a legal [*i.e.*, tax] viewpoint the purposes and concern of the Government are identical whether the plow or cattle are bought by the Indians with individual Indian moneys, the expenditure of which has been approved by the Superintendent, or bought by the Indians with revolving loan funds or judgment fund money, pursuant to a plan of rehabilitation approved by the Superintendent * * *. The important factor is the acquisition and use of the property in execution of a government plan for the Indians.

A fortiori, where the undertaking is a tribal one rather than an individual one and is under the authority of specific federal legislation, it is proper to construe the applicable federal statutory exemption, which was designed for the Indians' economic betterment, to bar state taxation of the personal property used by the Tribe for the improvement of tribal land. As petitioner correctly states (Pet. 7): "Tribal property was not subject to state taxation when the horse and plow were utilized for economic development. The means have changed, such as the ski enterprise in this case, but the purpose is unchanged."

CONCLUSION

The judgment of the New Mexico Court of Appeals should be reversed and the case should be remanded for entry of an order requiring refund of the taxes and penalties collected by New Mexico from the Mescalero Apache Tribe.

Respectfully submitted.

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IN THE

UPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1971

Nos. 71-788, 71-834, 71-1031

Appellee Tribe,	*Petitioner,*
v.	
Commissioner of the Bureau of the State of New Mexico, and of Revenue of the State of	*Respondents.*
McClanahan, on behalf of herself others similarly situated,	*Appellant,*
v.	
State Tax Commission,	*Appellee.*
Bracker,	*Appellant,*
v.	
of Washington, *et al.,*	*Appellees.*

TIORARI TO THE COURT OF APPEALS
W MEXICO, AND ON APPEAL FROM
REME COURT OF ARIZONA AND
REME COURT OF WASHINGTON

AMICUS CURIAE MULTISTATE TAX COMMISSION

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1971

Nos. 71-738, 71-834, 71-1031

MESCALERO APACHE TRIBE,	*Petitioner,*
v.	
FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,	*Respondents.*
ROSALIND MCCLANAHAN, on behalf of herself and all others similarly situated,	*Appellant,*
v.	
ARIZONA STATE TAX COMMISSION,	*Appellee.*
LEONARD TONASKET,	*Appellant,*
v.	
THE STATE OF WASHINGTON, *et al.,*	*Appellees.*

ON CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO, AND ON APPEAL FROM SUPREME COURT OF ARIZONA AND SUPREME COURT OF WASHINGTON

BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION

STATEMENT OF INTEREST

This brief is submitted, with the written consent of the parties, to permit the Multistate Tax Commission to supplement the arguments of the appellees in each of these causes.

The Multistate Tax Commission is the official administrative agency of the Multistate Tax Compact entered into by twenty-one states as full members, and by fifteen states as associate members.[1]

It is significant to the Multistate Tax Commission that the applicability of various state excises as pertains to Indians and the Indian tribal organizations both on and off the reservations and in reference to sales to both Indians and non-Indians be clarified by this court. In *Mescalero*, there is a question posed concerning the the excise tax status of business operations off the reservation, apparently conducted by an organized Indian tribe through a corporation organized by the tribe. *McClanahan* involves the application of an income tax to an Indian in her individual capacity as a resident of the state of Arizona residing on the Navajo reservation where she earns the income. *Tonasket* is concerned with cigarette sales primarily to non-Indians by an individual Indian on his allotted land on the Colville tribe reservation, jurisdiction over which has been conceded to the state of Washington.

Each of these cases poses serious tax problems for many of the Multistate Tax Commission members. Stretched to their ultimate conclusions, argu-

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[1] The legislatures of 21 states have enacted the Multistate Tax Compact, thereby making those states regular members of the Commission. Those states are: Kansas, Washington, Texas, New Mexico, Illinois, Florida, Nevada, Oregon, Missouri, Nebraska, Arkansas, Idaho, Hawaii, Colorado, Wyoming, Utah, Montana, North Dakota, Michigan, Alaska and Indiana. One state, Alabama, has enacted its Compact subject to Congressional legislative consent. Pending enactment of such consent, Alabama is considered to be an associate member state. Fourteen other states are associate members at the request of the respective governors. Those states are: Arizona, California, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Pennsylvania, South Dakota, Tennessee, Virginia and West Virginia.

made in these three cases against state tax jurisdiction would free from any state excise taxes the business and other income-producing activities of all Indians, whether carried on within the confines of an Indian reservation or outside the Indian reservation, and whether carried on by an individual Indian or by a tribe or by an independent corporation created by the tribe.

STATEMENT OF FACTS

The significant facts in each of these cases have been set forth in other briefs, and need not be repeated here in any detail. In bare outline, they are as follows:

1. Tonasket.

Tonasket, a full blood member of the Colville tribe, conducts a retail business (primarily for the sale of cigarettes) which he owns on his allotted lands on the Colville Indian reservation. He purchases same brand cigarettes from out-of-state distributors and then sells them primarily to non-Indians free of any state tax. The federal cigarette tax is paid on all cigarettes which he sells. It is clear that profits from Tonasket's business are subject to the federal income tax. The Colville tribe has given its consent to the state of Washington to assume criminal and civil jurisdiction, which Washington has done pursuant to Public Law 83-280, 67 Stat. 588, 28 U.S.C.A. § 1360 (1964), and chapter 37.12 Revised Code of Washington (RCW).

2. McClanahan.

McClanahan is a full blood member of the Nav-

ajo tribe; resides on the Navajo reservation in Arizona; and earns wages from employment on the reservation. It is clear that her income in question is subject to the federal income tax.

3. Mescalero

The Mescalero Apache tribe has constructed and operates ski resort facilities on properties off the reservation leased by a tribal corporation from the United States Forest Service. The development of the facilities was made possible by loans from the United States under authority of 25 U.S.C. 470, but the facilities were built by and are operated by the tribal corporation subject to federal approval as to plans for initial facilities, construction of improvements and arrangements for sub-leasing, budgeting and accounting.

SUMMARY OF ARGUMENT

There is no question, as pertains to these three cases (*Mescalero*, *McClanahan* and *Tonasket*), that the location of the respective taxable activities is within the territorial limits of the respective states which are asserting jurisdiction. No treaties, statehood enabling legislation or federal statutes remove these locations from the territorial limits of the respective states. *Surplus Trading Co. v. Cook*, 281 U.S. 647, 74 L ed 1091 (1930); *State of New York ex rel. Ray v. Martin*, 326 U.S. 496, 90 L ed 261 (1946); *United States v. McGowan*, 302 U.S. 535, 82 L ed 410 (1938); *United States v. McBratney*, 104 U.S. 621, 26 L ed 869 (1882); *Draper v. United States*, 164 U.S. 240, 41 L ed 419 (1896); *Thomas*

v. City, 169 U.S. 264, 42 L ed 740 (1898); *Wagoner v. Evans*, 170 U.S. 588, 42 L ed 1154 (1898); *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 50 L ed 398 (1906); *Williams v. Lee*, 358 U.S. 217, 3 L ed 2d 251 (1959); *Organized Village of Kake v. Egan*, 369 U.S. 60, 7 L ed 2d 573 (1962). It is clear then that jurisdiction exists in a general sense. The question is whether or not it exists in terms of the specific manner in which it is exercised in these tax cases.

The question is answered by an analysis of the legal principles which apply to these respective matters. None of these principles would preclude the exercise of jurisdiction. The states of Washington, New Mexico and Arizona are not taxing any property or interests in property. The taxes in issue are general excise taxes imposed on income or receipts derived from employment or business operations.

In the *Tonasket* case, there is an affirmative assumption of criminal and civil jurisdiction by the state of Washington and a relinquishment of jurisdiction by the Colville tribe pursuant to applicable federal (PL 83-280, 67 Stat. 588, 28 U.S.C.A. § 1360 (1964), *supra*),* state (chapter 37.12 RCW, *supra*), and tribal law (Colville Business Council Resolution 1965-4). Any claimed tax immunity in the *Tonasket* case must first be predicated on the argument that the controlling federal statute does not mean what it says. Assuming, *arguendo*, that the federal statute (PL 280) does not mean what it says, Tonasket must establish either (1) that he is

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*Hereinafter referred to as PL 280.

a federal instrumentality and thus impliedly immune from state excise taxes in his private profit proprietary endeavors, or (2) that the United States has preempted the field. Since there is no reason to suppose that the doctrine of implied governmental immunity is broader as pertains to Indians in their individual capacity than to anyone else, it is clear that this doctrine does not grant Tonasket any exemption. Furthermore, there has been no preemption because Tonasket is not in any way regulated by the federal government in regard to the sales in which the state of Washington is interested, namely, his sales to non-Indians (Washington exempts from its cigarette tax laws sales by Indians to Indians).

In *McClanahan*, the only restriction applicable is that of implied governmental immunity. It is no more applicable to *McClanahan* than to *Tonasket*.

In *Mescalero*, the issues are again those pertaining to preemption by the Congress and to implied governmental immunity. There is no preemption because the Indian Trader Act applies only to traders on the reservation. Furthermore, no exemption from state taxation can be inferred from the fact that the federal government loaned money to finance and took the normal lender precautions of overseeing the utilization of that money within the terms of the loan. Nor may immunity be inferred from the fact that the ski resort is located on federal forest lands leased to the tribe. Finally, in conducting a *proprietary enterprise*, the tribe is not impliedly immune from state excise taxes under the doctrine of implied governmental immunity.

Apart from any consideration of express federal legislation (PL 280), *Mescalero*, *McClanahan* and *Fawnskin* are controlled by the tax decisions of this court upholding taxation of Indians in the Oklahoma state tax cases of *Oklahoma Tax Com. v. United States*, 319 U.S. 598, 87 L ed 1612 (1943), and *West v. Oklahoma Tax Commission*, 334 U.S. 717, 92 L ed 1676 (1948); the United States income tax cases of *Five Civilized Tribes v. Com'r of Int. Rev.*, 295 U.S. 418, 79 L ed 1517 (1935), *Choteau v. Burnet*, 283 U.S. 691, 75 L ed 1353 (1931); *Com'r of Int. Rev. v. Walker*, 326 F 2d 261 (CCA 9th, 1964); and *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 82 L ed 907 (1938); and the state income tax case of *Lusky v. State Treasurer of Oklahoma*, 297 U.S. 420, 80 L ed 771 (1936); and property and excise tax cases such as *McCurdy v. United States*, 246 U.S. 263, 62 L ed 706 (1918), *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 72 L ed 709 (1928), and *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F 2d 1184 (CCA 9th, 1971), cert. den. U.S. Supreme Court February 22, 1972.

Arguments for appellants' position in these cases proceed upon the erroneous assumption, contrary to the *Kake* case, *supra*, and to decisions referred to both herein and in *Kake*, that the states possess no tax jurisdiction over Indians except as specifically authorized by Congress. Since there is no expressed or implied prohibition to the tax imposition here questioned, appellants' arguments are clearly fallacious.

The *Kake* case, *supra*, and *Williams v. Lee*, *supra*, establish the principle that the states have a residual jurisdiction over Indian affairs subject to two conditions: (1) That Congress has not preempted the field, and (2) that the exercise of state jurisdiction does not interfere with the Indians' right of self-government.

Where there is no conflict between federal and state authority, and when the state action is in an area left void *in fact* by Indian local self-government, both logic and necessity dictate that state law should fill the gap.

ARGUMENT

1. An Indian Reservation is Within the Territorial Jurisdiction of The State in Which it is Located.

Premised on the early cases of *Worcester v. Georgia* (U.S.), 6 Pet. 515, 8 L ed 483; *Kansas Indians* (*Blue Jacket v. Johnson County*) (U.S.), 5 Wall 737, 18 L ed 667 (1866); and *New York Indians* (*Fellows v. Denniston*) (U.S.), 5 Wall 761, 18 L ed 708 (1866), the argument is made on behalf of the appellants in these causes that the states have no jurisdiction over Indian reservations except as expressly authorized by Congress. This argument is best expressed in terms of geography; an Indian reservation is "off limits" to state jurisdiction. However, under later cases such as *Kake v. Egan*, *supra*, 369 U.S. 60, 70 L ed 2d 573 (1962); *Surplus Trading Co. v. Cook*, *supra*, 281 U.S. 647, 74 L ed 1091 (1930); *New York ex rel. Ray v. Martin*, *supra*, 326 U.S. 496, 90 L ed 261 (1946); *United States v.*

McGovern, supra, 302 U.S. 535, 82 L ed 410 (1938); and *Williams v. Lee, supra*, 358 U.S. 217, 3 L ed 2d 251 (1959), any such territorial approach to the problem of state taxing jurisdiction is unwarranted, and obscures the true nature of the problems in the instant cases.

Surplus Trading Co. v. Cook, supra, described the conditions under which the states may exercise jurisdiction over Indian reservations, as follows:

> "It is not unusual for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the state. On the contrary, the lands remain part of her territory and within the operation of her laws save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal.
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> "A typical illustration is found in the usual Indian reservation set apart within a state as a place where the United States may care for its Indian wards and lead them into habits and ways of civilized life. Such reservations are part of the state within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards. * * *" (281 U.S. at 650-651.)

An even more unqualified statement was made in *State of New York ex rel. Ray v. Martin, supra*:

> "* * * in the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries. * * *" (326 U.S. at 499, quoted with approval in *Kake v. Egan*, 369 U.S. at 74.)

In *United States v. McGowan, supra*, this court held, with reference to the Reno Indian colony in Nevada, which was purchased by the United States for use of Indians:

> "The Federal prohibition against taking intoxicants into this Indian colony does not deprive the State of Nevada of its sovereignty over the area in question. The Federal Government does not assert exclusive jurisdiction within the colony. Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the Federal enactments." (302 U.S. at 539.)

As more recently stated by this court in *Kake v. Egan, supra*:

> "The general notion drawn from Chief Justice Marshall's opinion in Worcester v Georgia (US) 6 Pet 515, 561, 8 L ed 483, 501; Kansas Indians (Blue Jacket v Johnson County) (US) 5 Wall 737, 755-757, 18 L ed 667, 672, 673; * * * that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations. *By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law.* [Citation omitted.] In Langford v Monteith, 102 US 145, 26 L ed 53, the Court held that process might be served within a reservation for a suit in territorial court between two non-Indians. In United States v McBratney, 104 US 621, 26 L ed 869, and Draper v United States, 164 US 240, 41 L ed 419, 17 S Ct 107, the Court held that murder of one non-Indian by another on a reservation was a matter for state law." (369 U.S. at 72-73.) (Emphasis added.)

In *Williams v. Lee*, *supra*, this court, in commenting on the principles enunciated in *Worcester v. Georgia*, *supra*, stated as follows:

> "* * * Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained. * * * Essentially, absent governing Acts of Congress, *the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.* * * *" (358 U.S. at 219-220) (Emphasis added.)

These cases point out the proper direction and form for our inquiry. First, it is to determine whether the effect of the state taxes here in question conflicts with enunciated federal legislation and policies concerning Indian affairs.[2] As will be demonstrated, the taxes in question are not forbidden by any act of Congress or by treaty provisions, and do not directly impinge upon any federal policy. Secondly, our inquiry must determine whether the taxes involved in these causes conflict with tribal self-government. As will also be demonstrated, there is no such conflict.

2. Imposition of the Taxes in the Instant Causes Is Not in Conflict With any Federal Statutes or Regulations Concerning the Individual Indians and the Indian Tribes in Question.

The appellants and the amici curiae for the ap-

[2] The appellants' argument that the states have no jurisdiction over Indians or their lands unless specifically granted by Congress is refuted by their preemption argument. Preemption has application and meaning only where both the federal government and the states have concurrent jurisdiction over the subject matter. The subject matter is preempted by Congress only when Congress exercises jurisdiction in such a manner that any state legislation over the same subject matter would be conflicting.

pellants have not pointed to and do not rely upon any express federal statutes or regulations which expressly prohibit the imposition of the state taxes in question. However, a common argument of the appellants and amici curiae for appellants pertaining to conflicting federal legislation stems from the notion that the taxes in question are taxes somehow imposed upon restricted or trust lands or funds of the Indians and Indian tribal organization in question, such lands themselves being exempt from taxation by reason of express treaty provisions. Such an argument misconceives the legal incidence and nature of the taxes with which we are here concerned. *McClanahan* involves a general income tax on earnings. It has long been settled that an income tax is not a tax on property or an interest in property. An income tax, by its very nature, is an excise tax imposed upon an abstract concept of taxable income. As stated in *Graves v. New York*, 306 U.S. 466, 83 L ed 927 (1939):

> "* * * The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable, [cases cited] * * *" (306 U.S. at 480)

The same is true in regard to the New Mexico gross receipts tax and compensating (use) taxes involved in *Mescalero* and the Washington cigarette tax involved in *Tonasket*. A tax upon the use or sale of property is not a tax on the property. *Sullivan v. United States*, 395 U.S. 169, 23 L ed 2d 182 (1969); *United States v. Detroit*, 355 U.S. 466, 2 L ed 2d 424

(1952). Indeed, if these taxes were considered property taxes, they would undoubtedly be invalid by reason of *state law*, as their imposition would violate state constitutional property tax uniformity requirements.[1]

The congressional policy of exempting from state and federal taxes trust or restricted property of Indians or Ihdian tribal organizations is not applicable to these causes. This type of property was the subject of taxation involved in *Squire v. Capoeman*, 351 U.S. 1, 100 L ed 883 (1956). That case properly held that the federal income tax could not be applied to the proceeds of timber taken from the land since it was in substance a tax on the land. In contrast, the taxes in the instant causes are personal income or general business excise taxes. Their incidence does not fall on any property or interest in property.

A second common argument, related to the first, is that since the taxes in question under state law can create liens for collection against tax exempt property of the Indians, the taxes themselves are invalid. However, the validity of the imposition of a tax does not turn on whether or not all of the assets or property of the taxpayer are available for enforcement of the tax by lien, attachment, execution, or otherwise. This court can take judicial notice of the

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[1] This conclusion follows because the imposition of an additional tax on some property and not on other property violates the common uniformity requirements of equality of rate of taxation. For example, if a tax tax were a tax on property, its imposition on property acquired during the tax year would impose an additional tax and thus higher rate on this property compared to all other property for the year in which it was acquired. Cooley on Taxation, Vol. 1 (4th ed.), [illegible]

fact that not all property of every citizen is available to meet validly imposed tax obligations. This alone does not invalidate a tax.

In *United States v. Alabama*, 313 U.S. 247, 85 L ed 1327 (1941), this court recognized the validity of a state tax and the lien arising thereunder, even though the lien could not be enforced against the United States without its consent because of federal ownership of the property subject to the lien.

The precise question of collection of a state tax from Indian restricted or trust property was faced by the court in *West v. Oklahoma Tax Commission*, *supra*, 334 U.S. 717, 92 L ed 1676 (1948). This court there noted:

> "* * * It is therefore possible that if the tax were unpaid Oklahoma might try to place a lien upon the property which is being transferred, property as to which the United States holds legal title. Complications might arise as to the validity of such a lien. And the United States would be burdened to the extent of opposing the imposition of the lien or seeing that the tax was paid so as to avoid the lien." (334 U.S. at 725)
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> "The result of permitting the imposition of the inheritance tax on the transfer of trust properties may be, as we have noted, to deplete the trust corpus and to create lien difficulties. But those are normal and intended consequences of the inheritance tax. And until Congress has in some affirmative way indicated that these burdens require that the transfer be immune from the inheritance tax liability, the Oklahoma Tax Commission Case permits that liability to be imposed. * * *" (334 US at 727)

Thirdly, the appellants suggest that federal legislation generally establishing a protective policy

toward the Indians and their lands supports the tax exemption here claimed. This protective policy which placed the Indian in a ward or dependent status was not only implemented by restrictions on the Indian's ability to dispose of his land, but was also implemented by the Indian Trader Act (25 USC §§ 261-264)* and specific policies and programs of the government for the economic rehabilitation of the Indians.

However, the fact that in these particulars Congress has sought to treat the Indian as a ward or dependent of the United States does not create any general immunity from state taxation.

As noted by this court in *Oklahoma Tax Com. v. United States, supra*:

> "It is true that our interpretation of the 1933 statute must be in accord with the generous and protective spirit which the United States properly feels toward its Indian wards, but we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of its Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian. We have held that the Indians, like all other citizens, must pay federal income taxes. Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue, supra (295 US 421, 79 L ed 1520, 55

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* As shown in the brief of appellees' in Tonasket, the Indian Trader Act has no application in any of these cases, for the reason that the Indian trust in these cases are in no way regulated by the Indian Trader Act.

8 Ct 320). 'Wardship with limited power over his property' did not there 'without more render [the Indian] immune from the common burden.' * * *."

The correctness of this court's refusal to consider the wardship or dependency status of the Indian as a basis for tax exemption is reinforced by the limited nature of the overall protective policy mentioned above.

Coupled with this protective policy was the policy of removing the Indian and his land from any dependent or wardship relation with the United States, while preserving tribal customs and laws. Such, for example, was the purpose of the Indian Reorganization Act of 1934 (48 Stat. 984 (1934), 25 U.S.C. 461 *et seq.*). The following sections of the United States Code are provisions of this act and embody those dual policies.

25 U.S.C. § 465 authorizes acquisition of lands for Indians which are tax-exempt and held in trust. Up to $2 million may be appropriated for this purpose. In congressional debate on this section, the purpose was stated to be consolidation of badly checker-boarded reservations and supplementation of Indian stock grazing and forest lands, 78 Cong. Rec. 11730.

25 U.S.C. § 470 establishes a $20 million revolving fund and authorizes loans to Indian chartered corporations for the purpose of promoting economic development of tribes and members. Congress intended this provision to be broad enough to permit loans to corporations or individual members, 78 Cong. Rec. 11730.

An Indian chartered corporation for profit does not have the same status as an Indian tribe under the Indian Reorganization Act of 1934. The latter is organized for *governmental purposes* under 25 U.S.C. § 476. The former is organized under 25 U.S.C. § 477 and requires petition by one-third of the adult Indians and ratification by a majority of them of a corporate charter. Such charter may convey to the incorporated tribe power to manage real and personal property and "such further powers as may be incidental to the conduct of corporate business, *not inconsistent with the law*," 25 U.S.C. § 477. (Emphasis added.)

The intent of congress in separating its appropriations for land acquisition and loans, as well as its provisions for tribal and corporate organization, is clear. Tribal organization and the consolidation of reservations further the federal policy of preserving Indian customs and management of their *own* affairs. Corporate organization and the loan fund further the federal policy of integrating the Indians into the American economic life. As the sponsor of the Indian Reorganization Act stated:

> "* * * the program of self-support and of business and civic experience in management of their own affairs * * * will permit increasing numbers of Indians to enter the white world on a footing of *equal* competition." (78 Cong. Rec. 11732) (Emphasis added.)

This goal of economic integration is being attained; as instances of this, we need only look to the separate selling activities of Mr. Tonasket, and the ski resort enterprise of the Mescalero Apache Tribe.

Their activities are in direct competition with similar non-Indian business enterprises, and their financial success depends upon essentially non-Indian market or clientele.

Neither property tax exemptions on trust or restricted land, nor possible collection problems, nor wardship status should exempt these activities from the common tax burden, or provide the basis for implying a congressional intent that there be such an exemption.

> "This Court has repeatedly said that tax exemptions are not granted by implication. * * * It has applied that rule to taxing acts affecting Indians as to all others." (*Oklahoma Tax Com. v. United States*, 319 U.S. at 606.)

3. The Principle of Implied Governmental Immunity Does Not Free The Appellants From the Taxes in Question.

In substance, the appellants and amici curiae in these causes argue for the application of the principle of implied governmental immunity. However, the fact that the taxes in question here may have indirect or remote effect on some United States government policy concerning Indian affairs, or on self-government reserved to the Indian tribes by treaty, does not control.

The instant cases present, we suggest, a familiar problem in a perhaps less familiar context, i.e., the problem of implied governmental tax immunity. The decisions of this court on the question of state taxing power as it affects federal activities, and the decisions on the question of federal taxing power as

affects state activities, provide clear guidelines for resolving the problem of state taxing power as it affects Indian activities. We also suggest that the pattern of this court's decisions is to resolve questions in each of these three separate areas on a consistent basis, and that the clear trend of these decisions, in each of the three areas, is to narrow the scope of implied tax immunity, be that immunity invoked on behalf of the United States, a state, or an Indian. This narrowing has occurred primarily through a complete discarding of the former "economic burden" test. See generally *Graves v. New York*, *supra*, 306 U.S. 466, 83 L ed 927 (1939); *Helvering v. Mountain Producers Corp.*, *supra*, 303 U.S. 376, 82 L ed 907 (1938); *Oklahoma Tax Com. v. Texas Co.*, 336 U.S. 342, 93 L ed 721 (1949); *Alabama v. King & Boozer*, 314 U.S. 1, 86 L ed 3 (1941); *Curry v. United States*, 314 U.S. 14, 86 L ed 9 (1941); *James v. Dravo Contracting Co.*, 302 U.S. 134, 82 L ed 155 (1937); *Penn Dairies, Inc. v. Milk Control Com. of Pennsylvania*, 318 U.S. 261, 87 L ed 748 (1943); *Esso Standard Oil Co. v. Evans*, 345 U.S. 495, 97 L ed 1174 (1953); *United States v. City of Detroit*, *supra*, 355 U.S. 466, 2 L ed 2d 424 (1958).

Of these cases, *Oklahoma Tax Com. v. Texas Co.*, *supra*, *Helvering v. Mountain Producers Corp.*, *supra* and *Oklahoma Tax Com. v. United States*, *supra* are of special importance.

In *Oklahoma Tax Com. v. Texas Co.*, *supra*, this court had before it the question of:

> * * * whether a lessee of mineral rights in allotted and restricted Indian lands is immu-

nized by the Constitution against payment of nondiscriminatory state gross production taxes and state excise taxes on petroleum produced from such lands. * * *" (336 U.S. at 349)

In answering this question, the court noted:

"* * *[I]t has long been established that property owned by a private person and used by him in performing services for the Federal Government is subject to state and local ad valorem taxes. * * *" (336 U.S. at 350)

"Moreover, even if the status of respondents as federal instrumentalities, in the sense in which they use the term, were fully conceded, it seems difficult to imagine how any substantial interference with performing their functions as such in developing the leaseholds could be thought to flow from requiring them to pay the small tax Oklahoma exacts to satisfy their shares of the state's expense in maintaining and administering its proration program. * * *" (336 U.S. at 351)

The Court then noted the uniform pattern which had developed both in the area of state taxation and in the area of federal taxation:

"* * * this Court's more recent pronouncements have beaten a fairly large retreat from its formerly prevailing ideas concerning the breadth of so-called intergovernmental immunities from taxation, a retreat which has run in both directions—to restrict the scope of immunity of private persons seeking to clothe themselves with governmental character from both federal and state taxation. The history of the immunity, by and large in both aspects, represents a rising or expanding curve, tapering off into a falling or contracting one." (336 U.S. 352)

This court then analyzed in detail the history of some of the immunity cases as pertained to Indiana. It attributed particular importance to *Helver-*

v. Mountain Producers Corp., supra, 303 U.S. 376, 82 L ed 907 (1938), a case involving federal taxing power over an alleged state instrumentality.

In *Helvering* the court found that a lessee under an oil and gas lease of state school lands is not entitled to immunity, as a state instrumentality, from federal taxation in respect of income derived from operations under the lease. This same rule was applied in *Oklahoma Tax Com. v. Texas Co., supra*, to the state taxes there involved. The *Helvering v. Mountain Producers Corp.* test, quoted in *Oklahoma Tax Com. v. Texas Co., supra*, is that:

> "* * * immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects. * * *" (303 U.S. at 386)

In *Helvering*, the court further refined the test by stating:

> "* * * And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the Government is other than indirect and remote. * * *" (303 U.S. at 386-387)

In *Oklahoma Tax Com. v. United States, supra*, 319 U.S. 598, 87 L ed 1612 (1943), in upholding an Oklahoma estate tax, the court again affirmed *Helvering v. Mountain Producers Corp., supra*, and held that:

"* * * The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication." (319 U.S. at 604)

"* * * A federal court has held, in a well reasoned decision defended before us by the Solicitor General of the United States, who is not a party to this action, that an Indian's estate is subject to the federal estate tax. Landman v. Commissioner of Internal Revenue (CCA 10th) 123 F (2d) 787. Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes." (319 U.S. at 608)

"Recognizing that equality of privilege and and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. Graves v. New York, 306 US 466, 83 L ed 927, 59 S Ct 595, 120 ALR 1466, permitted States to impose income taxes upon government employees and Helvering v. Gerhardt, 304 US 405, 82 L ed 1427, 58 S ct 969, permitted the federal government to impose taxes on state employees. O'Malley v. Woodrough, 307 US 277, 83 L ed 1289, 59 S Ct 838, 122 ALR 1379, overruled a previous decision which held that judges should not pay taxes just as other citizens, and Helvering v. Mountain Producers Corp. 303 US 376, 82 L ed 907, 58 S Ct 623, supra, repudiated former decisions seriously limiting state and federal power to tax. See also Metcalf v. Mitchell, 269 US 514, 70 L ed 384, 46 S Ct 172, and James v. Dravo Contracting Co. 302 US 134, 82 L ed 155, 58 S Ct 208, 114 ALR 318. The trend of these cases should not now be reversed." (319 U.S. 610)

The holding of *Oklahoma Tax Com. v. United States, supra,* was reaffirmed in *West v. Oklahoma Tax Commission, supra,* 334 U.S. 717, 92 L ed 1675

(1943), and extended to property held in trust by the United States for the benefit of the decedent Indian and his heirs. The court there noted that its decision in *Oklahoma Tax Com. v. United States, supra,* foreclosed an application of *United States v. Rickert,* 188 U.S. 432, 47 L ed 532 (1903).

Thus, *Rickert* provides no basis for resurrecting discarded notions of implied immunity, and should be confined to its facts, *i.e.*, to a situation in which a property tax was imposed directly upon property owned by the United States for the use and benefit of an Indian.

The reference, in *Oklahoma Tax Com. v. United States, supra,* to the applicability of the federal estate tax to Indians highlights an important principle established by *Helvering v. Mountain Producers Corp., supra, Oklahoma Tax Com. v. Texas Co., supra,* and *Oklahoma Tax Com. v. United States, supra.* Absent a clearly expressed congressional intent to the contrary, Indian immunity from state taxation (or lack thereof) should parallel Indian immunity from federal taxation (or lack thereof) and each should be determined by the same test.

This principle is also established by decisions of this Court involving state and federal taxation of Indian income.

Choteau v. Burnet, supra, 283 U.S. 691, 75 L ed 1353 (1931); *Five Civilized Tribes v. Com'r of Int. Rev., supra,* 295 U.S. 418, 79 L ed 1517 (1935); *Leahy v. State Treasurer of Oklahoma, supra,* 297 U.S. 420, 80 L ed 771 (1936). *Choteau* upheld the

imposition of the federal income tax on income received by a member of an Indian tribe as his share of royalties from oil and gas leases of tribal land, which was payable to him without restriction. *Leahy* upheld the imposition of a state income tax upon a competent member of the Osage tribe on income from his share of restricted mineral resources of the tribe.

This court there noted:

> "The facts are substantially the same as those presented in Choteau v. Burnet, supra, which upheld a federal income tax on a like payment. The applicable statutes and decisions are discussed there. As Leahy was entitled to have the income paid to him and was free to use it as he saw fit, no reason appears why it should not be taxable also by the State." (297 U.S. at 421)

In *Five Civilized Tribes v. Com'r of Int. Rev., supra*, the court upheld the imposition of the federal income tax on income derived from investment of surplus income from restricted land which was exempt from taxation as long as the title remained in the original allottee. Upholding the tax, the court noted:

> "We find nothing in either [federal statutes concerning the exemption of the land] which expresses definite intent to exclude from taxation such income as that here involved. See Shaw v. Gibson-Zahniser Oil Corp. 276 U.S. 575, 581, 72 L ed. 709, 714, 48 S. Ct. 333.
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> "Nor can we conclude that taxation of income from trust funds of an Indian ward is so inconsistent with that relationship that exemption is a necessary implication. Nontaxability and restriction upon alienation are distinct things. [Citation omitted.] The taxpayer here is a citizen of the United States, and *wardship with limited power over his property does not, without more, render him immune from the common burden.*
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> "Shaw v. Gibson-Zahniser Oil Corp. 276 U.S. 575, 72 L ed. 709, 48 S. Ct. 333, supra, held that

restricted land purchased for a full-blood Creek —ward of the United States—with trust funds was not free from state taxation, and declared that such exemption could not be implied merely because of the restrictions upon the Indian's power to alienate." (295 U.S. at 421) (Emphasis added.)

The taxpayers in the instant cases are no more federal instrumentalities, and immune as such from state taxation, than were the taxpayers in *Oklahoma Tax Com. v. United States*, *supra*, and *Oklahoma Tax Com. v. Texas Co.*, *supra*. And just as their income producing activities are not immunized from the scope of federal taxation, neither should they be immunized from the scope of state taxation.

In *New York v. United States*, 326 U.S. 572, 90 L ed 326 (1946), this court refused to exempt the state of New York from a federal tax imposed upon sales of mineral waters when the state engaged in the business of selling mineral waters. The court then noted:

"It is enough for present purposes that the immunity of the State from federal taxation would, in this case, accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning. Its exercise now, by a non-discriminatory tax, does not curtail the business of the state government more than it does the like business of the citizen. It gives merely an accustomed and reasonable scope to the federal taxing power. Such a withdrawal from a non-discriminatory federal tax, and one which does not bear on the State any differently than on the citizen, is itself an impairment of the taxing power of the national government, and the activity taxed is such that its taxation does not unduly impair the State's functions of government. The nature of the tax immunity requires that it be so construed as to allow to each government reasonable scope for

its taxing power, Metcalf v. Mitchell, 269 US 514, 524, 70 L ed 384, 392, 46 S Ct 172. * * *" (326 U.S. at 588-589)

Applying these principles to the instant cases, it is clear that none of the taxes in question so affect the Indians or the federal government that they must be stricken. They have only an indirect or remote effect on any governmental operations or policies. The *Tonasket* case revolves around the ability of an individual Indian to carry on the business of selling cigarettes free of the Washington cigarette tax. The *McClanahan* case involves the individual income tax liability of an individual Indian. In *Mescalero*, an Indian tribe claims to have the right to construct and operate a ski resort business of substantial magnitude without incurring any state liability whatsoever. It makes this claim even though the property and business in question are located off reservation property.

Indirectly, the appellants and their amici curiae are asking this court to do one of two things: either declare that Indians and their tribal organizations are instrumentalities of the federal government or that Indians and their tribal organizations, to the extent that they implement federal economic policy for the Indians, are so closely related to a federal instrumentality that immunity is to be implied. Neither of these requests is supportable by the case law defining the scope of governmental immunity of the Indians from either state or federal taxation. Furthermore, if the government's objective is to assimilate the Indians into society as competent

equal members of the business community—the stated objective—it is difficult to see how this can be accomplished without them sharing generally in the privileges and responsibilities of government, which includes their bearing their share of general business tax obligations.

Indeed, a striving for equality of tax burdens has been the source for this Court's narrowing of the scope of implied governmental immunity, including the federal instrumentality doctrine. As stated in *Oklahoma Tax Com. v. United States, supra*:

> "Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism." 319 U S at 610.

Should the Congress wish to resurrect such favoritism and reverse the trend, it may do so by express enactment. But until it does, the trend of this Court in sweeping away tax favoritism should continue.

4. The Taxes Imposed in These Cases Do Not Conflict With the Indian Right of Self-Government.

In *Kake v. Egan, supra*, 369 U.S. 60, 7 L ed 2d 573 (1962), this court rightly noted that:

> "Decisions of this Court are few as to the power of the States when not granted Congressional authority to regulate matters affecting Indians. * * *" (369 U.S. 74)

As to these decisions, however, the court noted:

> "These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. * * *" (369 U.S. 75)

Does the right of reservation-self-government prohibit the state taxes involved in the instant cases? We suggest that it does not, and that these taxes are perfectly compatible with that right.

If that right be conceived of as including the right to impose a tax upon the same activities or income as the state attempts to tax, no conflict thereby arises. An exercise of the taxing power of even such a sovereign as the federal government in no way precludes state taxation of the same subjects. Concurrent exercise of taxing powers by different sovereigns is an inherent part of our governmental system.

But should that right be conceived of as including the right to be immune from any exercise of state taxing power over commercial enterprises of the tribe or its members? This problem is perhaps presented in its most acute form by the *Mescalero* case, in which either the tribe or a corporation owned by it is the taxpayer. We suggest that, even if the tribal enterprise were fully on the reservation—which it is not—its taxation by New Mexico would not be in conflict with the tribe's right of self-government.

Again, a case from the field of intergovernmental immunity provides the guideline.

The test applied by this court in *New York v. United States, supra*, preserves unrestricted the traditional sovereign powers of the state, while at the same time refusing to allow that sovereignty to be a basis for immunizing from taxation state enterprises of the same type as are conducted by private

business. Certainly, the right of a tribe to self-government should no more be a shield against taxation than is the sovereignty of a state. Again, tax favoritisms may be established—both for a state or a tribal business enterprise—as a matter of congressional grace. But no such favoritisms should be implied from the concept of self-government or sovereignty, be it tribal or state.

5. Squire v. Capoeman, 351 U.S. 1, 100 L ed 883 (1956), Does Not Preclude Application Of The Taxes In The Instant Cases.

In this brief, we have placed great reliance upon *Oklahoma Tax Com. v. United States*, 139 U.S. 598, 87 L ed 1612 (1943), and *West v. Oklahoma Tax Com.*, 334 U.S. 717, 92 L ed 1676 (1948). By reason of a Court of Claims' decision (*Mason v. United States*, June 16, 1972, appended to the Brief of Amicus Estate of Rose Mason, filed in McClanahan) the question arises as to whether this reliance is misplaced. For the Court of Claims held that *Squire v. Capoeman, supra*, has overruled at least *West*, if not both cases.

Note first that *Squire v. Capoeman* starts with two basic principles which are central to our whole brief:

> "We agree with the Government that Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. We also agree that, to be valid, exemptions to tax laws should be clearly expressed. * * *" (351 U.S. at 6)

Thus, the tax exemption found in *Squire v. Capoe-*

mas rested upon a specific congressional enactment, i.e., section 6 of the General Allotment Act, 25 USC 349. In applying this provision, this Court stated:

> "The literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted." (351 U.S. at 8)

And the court in *Squire v. Capoeman, supra*, went on to hold where timber on the allotment is converted to money through sale of that timber, the exemption applies to the proceeds of the sale, so as to preclude a federal capital gains tax.

This holding does indeed cast doubt on one of the grounds of *West*, i.e., it casts doubt on the proposition that a tax, such as inheritance tax (or a capital gains tax as in *Squire*) may be valid as applied to trust property even though its direct effect is to diminish the corpus of the trust.

However, we do not rely, in the instant cases, on this aspect of *West*. In none of the instant cases is the tax involved either imposed upon or measured by trust property or the proceeds from the conversion thereof into money.

In essence, *Squire* held that Congress did not intend to take away with one hand, through the capital gains tax, a tax exemption which it had granted with the other hand, through section 6 of the General Allotment Act. In the instant cases, in contrast, we can find no congressional enactment which grants any applicable tax exemption in the first place.

CONCLUSION

The above cited cases collectively stand for the proposition that general nondiscriminatory taxes imposed on individual Indian citizens as residents and citizens of the state and United States are applicable if not expressly forbidden by congressional enactment. No exemptions are implied. Here, the Indians have sought to engage in general business activities or employment within the state. There is no reason to place them on a different economic footing than any other resident citizen of their respective states as to these business activities. The question of whether or not they are "competent" or "incompetent" pertains solely to their relationship with their interests individually or collectively in land set aside for their benefit. It does not remove them as individuals from the general jurisdiction of a state for the imposition of general nondiscriminatory taxes which reach all residents and citizens alike.

It should be further noted that these tax cases upholding the state's power to impose the taxes here in question are in accord with this Court's basic principles recently announced in *Kake v. Egan, supra,* and *Williams v. Lee, supra,* that the states are free to tax where the state action does not interfere with reservation self-government. To tax the Indians in the instant cases does not any more interfere with their exercise of the right of self-government than does the state taxation of a judge's salary interfere with the right of the United States to govern itself. *Graves v. New York, supra,* 306 U.S. 466, 83 L ed 927 (1939).

The argument of the appellants and *amici curiae* for the appellants in these cases in effect isolates the Indians and the Indian communities from the rest of the United States. In substance, their argument is a return (1) to the sovereign-nation concept of *Worcester v. Georgia, supra*, which has been repudiated, and (2) to the assumption that the federal government has preempted all powers, duties and responsibilities not exercised by the Indians themselves. The history of adjudications by this court, the progression of the law on the subject of Indian affairs, and the general application of governmental immunity forcefully preclude any rule today of isolation of Indians. Further, the pattern of federal legislation in dealing with Indian questions has been to protect the Indian in his dependent status and at the same time to relieve him from that dependency by making him a responsible citizen of the state, community and nation in which he lives. This includes duties, responsibilities and privileges concerning the whole gamut of governmental affairs, including state taxation.

In closing, it should be observed that the states of Washington, New Mexico and Arizona and the Multistate Tax Commission are as much concerned about the plight of the Indian as is the United States. The businesses and the individual income here sought to be taxed would not be a reality were it not for the substantial commerce between Indians, on the one hand and non-Indian residents of the states of Washington, Arizona, and New Mexico on the other hand. It is not believed that this court will countenance, as

being in accord with its former decisions, a policy that undermines the Indians' state tax responsibility for the business activities they conduct and the income they earn within the respective jurisdictions of the states.

Respectfully submitted,

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TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. 71-738

THE MESCALERO APACHE TRIBE,
Petitioner,
vs.
FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

PETITIONER'S REPLY TO THE BRIEF FOR THE RESPONDENTS

The Petitioner files this brief in reply to the Brief for the Respondents.

Statement

The Respondents have mentioned two points in the Brief of the Petitioner they feel are inaccurate. Both of these points have to do with what is presented "in the record." Petitioner feels that this Court can take judicial notice of the scope of authority the Bureau of Indian Affairs of the Department of the Interior exercises over all activities of Indian tribes. See 25 U.S.C. 1(a) and 25 U.S.C. 2.

As to the second contention, the Petitioner would point out that 25 C.F.R. pt. 91 is the regulation codifying 25 U.S.C. 470; 25 U.S.C. 470 has been stipulated to by both parties as the source of funds used in the ski area's development (App. 4), and it would logically follow that the regulations promulgated to control those funds may be considered by this Court in determining this case.

These are small points, but the Petitioner did wish to comment on them as the Respondents have continually attempted to limit the scope of the Stipulation of Facts. The Stipulation of Facts is the framework in which the case is placed, but it does not remove obvious facts from the consideration of the Court. By way of example, the application of 25 U.S.C. 470 as stipulated to by the parties, the Tribe feels that the Court can turn to regulations and other statutes that implement that one section, such as 25 U.S.C. 465, 25 U.S.C. 476 and 25 C.F.R. pt. 91. The stipulation as to one fact does not strip the Court of judicial notice or judicial curiosity as to facts and statutes that stand *in pari materia* with the facts stipulated upon by the parties.

Argument

I

THE STATE OF NEW MEXICO HAS NO AUTHORITY TO TAX THE MESCALERO APACHE TRIBE BECAUSE THE FEDERAL GOVERNMENT HAS EXCLUSIVE JURISDICTION OVER THE TRIBE.

The Brief of the Petitioner indicates that 25 U.S.C. 465 and 470 compliment the Enabling Act to exempt an Indian tribe from State taxation. Further construction of the Enabling Act [Ch. 310, Sec. 2, Cl. 2, 36 Stat. 557 (1910)] indicates the Act precludes taxation of this particular tribal activity. The Enabling Act refers to Indians and Indian tribes at several points; yet the language relied upon by the Respondents states ". . . held by any Indian, . . ." The Petitioner would suggest this refers to individual Indians and not organized tribes. The Petitioner would state that Congress has specifically shown that it intends to exercise control over Indian tribes. Where Congress has the power and authority to control Indians, any relinquishment of that authority must be by very specific intent. *United States v. United States Fidelity & Guaranty Co.*, 309 U. S. 506, 512 (1940); *Haile v. Saunooke*, 246 F.2d 293 (4th Cir., 1957). It should also be recalled that this Court has consistently held that Indian tax immunity provisions should be liberally construed in favor of the immunity. *Choate v. Trapp*, 224 U. S. 665, 675 (1912). Therefore, the phrase relied upon by the Respondents must be strictly construed and would not include a tribal activity of an Indian tribe.

The Enabling Act placed the State of New Mexico on the same restricted taxing basis as other states in the union. See *The Kansas Indians*, 5 Wall. 737, 755-757; *The New York Indians*, 5 Wall. 761, 771. The act states "except . . . to such extent as Congress has prescribed or may hereafter prescribe". The Congress has prescribed such an exemption, 25 U. S. C. 465.

The operation of the ski area is a governmental

function of the tribe; the revenue is going to meet educational, social and economic needs of the Mescalero Apache people - a basic function of a government (App. 3-4). This development enhances productivity and creates opportunities for social and economic advancement.

Even assuming for the sake of argument that the ski area operation is a proprietary function, cases have consistently held that such a factor is not relevant in determining tribal immunity. *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421, 423 (1968); *United States v. United States Fidelity and Guaranty Company*, 309 U.S. 506 (1940); *Maryland Casualty Company v. Citizens National Bank of West Hollywood*, 361 F.2d 517 (5th Cir., 1966). The theory developed by all these cases indicates no relevant difference between proprietary and governmental functions when dealing with Indian tribes. The guardian-ward relationship places the function, whatever it may be, under the protection of the federal government. By enacting 25 U.S.C. 470, Congress is stating that such activities, whether governmental or proprietary, are fulfilling a goal of federal Indian policy and are thereby exempt.

The Petitioner's reliance on *Stevens v. Commissioner of Internal Revenue*, 452 F.2d 754 (9th Cir., 1971) is to show the broad scope of the tax exemptions mentioned in 25 U.S.C. 465; only a general inference is made to 25 U.S.C. 470 - through the Indian Reorganization Act. As indicated in the Brief of the Petitioner, the properties acquired in *Stevens* had varying statuses of ownership. The *Stevens* case shows the interrela-

tionship between several statutes that together create an exemption. Placing statutes *in pari materia* in the present case shows the intent of Congress to create exemptions for tribal activities from state taxes. The main thrust of *Stevens* is to emphatically demonstrate the wide scope of 25 U.S.C. 465 and to show it is an integral part of statutory interpretation which results in tax exemptions for Indian-held interests and income from those interests. The land and improvements in the present case are an integral package, together they compose the ski resort. The taxing of any one portion would affect the whole ski complex. The intent of § 470 is to create economic growth, and just as the income in the *Stevens* case was determined to be exempt, the statutes applicable to the present case create an exemption from gross receipts and personal property use tax.

The Respondents rely on *Oklahoma Tax Commission v. Texas Co.* 336 U. S. 342 (1949) in portions of their brief (Respondents' Brief, pp. 9, 12, 14). Oklahoma Indians have had a limited status for sometime; this is due to the destruction of tribal sovereignty, allotment and the actual intergration of Indians into the main stream of Oklahoma society. This distinction has been pointed out in *Oklahoma Tax Commission v. United States*, 319 U. S. 598, 603 (1943). The various Indian Tax cases out of Oklahoma are not only limited because of the unique situation of Oklahoma Indians, but also have been placed in question by the holding of this Court in *Squire v. Capoeman*, 351 U. S. 1 (1956). *Squire* stands for the proposition that Congress should affirmatively authorize tax-

ability, thereby not leaving the door open to the states to tax unless specifically allowed by Congress. This would leave the burden on the state to indicate specific authority from Congress to tax Indian tribes. The role of *Oklahoma Tax Commission v. Texas Co.*, 336 U. S. 342 (1949), has been placed in further question by the recent Court of Claims decision, *Mason v. United States*, No. 417-70 (Ct. Cl. June 16, 1972):

> "Thus, both of the main foundations for *West* (and *Oklahoma Tax Commission*) were disavowed in *Squire v. Capoeman* . . . . The *West - Oklahoma Tax Commission* attitude has been silently dropped, and its reasoning no longer utilized. As their tests reveal, those two opinions were the yield of a period in which the Supreme Court was intent on doing away with the various forms of intergovernmental tax immunity and Indian tax exemption had been supported on that theoretical basis. For at least the last fifteen years, the Judicial climate has changed to concentrate, not on a relationship of Indian tax immunity to other exemptions, *but on the particular social goals Congress has sought to reach through its restrictions on Indian properties.*" (Emphasis added.)

II

THE STATE OF NEW MEXICO CANNOT TAX THE MESCALERO APACHE TRIBE BECAUSE SUCH A TAX WOULD INTERFERE WITH THE RIGHT TO SELF-GOVERNMENT.

The Respondents indicate that the Tribe should wait until it has been completely destroyed to determine if it has suffered any damage. As indicated many times, the power to tax is the power to destroy. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). The State of New Mexico is not only applying their taxes to the Tribe and thereby jeopardizing the very structure of the Tribe, they are usurping a right of the Tribe to control taxation on the reservation. See *Morris v. Hitchcock*, 21 App. D. C. 565, 593 (1903), affirmed 194 U. S. 384 (1904).

Both parties have cited *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). The Petitioner has cited the *Kake* case for the general proposition that the state cannot interfere with the rights of self-government or impair rights granted or reserved by the federal government (369 U.S. 60, 75) (Petitioner's Brief p. 25); the Respondents cite the case for the proposition that the facts of *Kake* indicate that tribal self-government was not interfered with in that case and therefore tribal self-government would not be interfered with in the present case (Respondents' Brief p. 13). The facts of *Kake* must be limited in light of recent decisions and in light of federal legislation. It should be noted that the *Kake* case is from the State of Alaska and Alaska is a Public Law 280 State (67 Stat. 588, 18 U. S. C. 1162, 28 U. S. C. 1360). As indicated previously, New Mexico is not a Public Law 280 State and has not assumed jurisdiction under methods outlined in specific federal legislation for assumption of jurisdiction. See also, 25 U. S. C. 1321-1326. The scope of *Kake* must also be interpreted in light of later holdings that statutory means are the

exclusive method of assuming jurisdiction on the part of the State. *Kennerly v. District Court of Montana*, 400 U. S. 423 (1970).

The danger is a real and current one. The interference is real because it restricts the Tribe in the operation of the enterprise and hampers the use of revenue for tribal improvement projects.

The State of New Mexico must feel that it can now interfere with on-reservation Indian activities. In Attorney General Opinion No. 72-23, May 8, 1972, the present case is cited for the following proposition: "These cases clearly establish that Indians on Indian lands can lawfully be subject to taxation by state authorities without necessarily interfering with any right of self-government or impairment of any rights granted or reserved to them by the federal government." The State of New Mexico is now saying they can intervene on Indian lands to tax Indian efforts; such a step is an obvious interference with the right to self-government and would lead to Indian tribal destruction. The Respondents advise on the one hand that their tax efforts are not interfering with tribal sovereignty, while issuing opinions that say the door is open to destroy the tribal structure. These are the very practices the Indian Reorganization Act was designed to prevent.

III

THE MESCALERO APACHE TRIBE IS EXEMPT FROM NEW MEXICO TAXES BECAUSE IT IS A FEDERAL INSTRUMENTALITY.

The Respondents continually cite *Agricultural National Bank v. State Tax Commission*, 392 U.S. 339 (1968), dissenting opinion. It should be noted that the majority found the exemption to apply and that the bank was immune as a federal instrumentality from the sales and use taxes. Though not in point as to the Indian question involved here, the pattern developed is similar because an Act of Congress granting immunity from state taxes was in question and this Court found the states to be without power to tax federally created entities. This immunity is based on the fact that these institutions are performing federal government functions and are therefore virtual arms of the government. Even applying the tests referred to by the Respondent, the Tribe meets those standards. The Tribe is organized under an Act of Congress, is fulfilling government duties established by treaty and statute, and is an integral part of a government department - the Department of the Interior. This test jells in light of specific federal Indian policy whose announced goal is ". . . maximizing opportunities for Indian control and self-determination." Senate Congressional Resolution 26, 92nd Congress, December 11, 1971.

The Tribe would point out it is not doing business with the United States government; rather the operation of the ski area is a business utilized for meeting federal Indian policies of maximizing economic self-sufficiency.

The Respondent cites a section from *Federal Indian Law*, U. S. Government Printing Office (1958), at page 16 of Respondents' Brief. The Petitioner would

state that it is organized to carry out governmental objectives (25 U.S.C. 476), and is operating under all applicable sections of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984-988.

Conclusion

The confrontation in this case is between a federal policy of fostering economic development of the American Indians and the taxing power of the State of New Mexico. The federal government has established programs to help Indian tribes reach economic and social goals molded by the Indians themselves. The action of the State of New Mexico is not only a limitation on a sovereign Indian tribe, but is a limitation on the federal government and its stated federal policy. The request of the Mescalero Apache Tribe is that it be allowed to move toward goals of economic and social self-sufficiency without interference from the State of New Mexico. The judgment of the New Mexico Court of Appeals should be reversed.

Respectfully submitted,

F. RANDOLPH BURROUGHS and
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September, 1972

SUPREME COURT OF THE UNITED STATES

Syllabus

MESCALERO APACHE TRIBE *v.* JONES, COMMISSIONER, BUREAU OF REVENUE OF NEW MEXICO, ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO

No. 71-738. Argued December 12, 1972—Decided March 27, 1973

The State of New Mexico may impose a nondiscriminatory gross receipts tax on a ski resort operated by petitioner Tribe on off-reservation land that the Tribe leased from the Federal Government under § 5 of the Indian Reorganization Act, 25 U. S. C. § 465. Though § 465 exempts the land acquired from state and local taxation, neither that provision nor the federal-instrumentality doctrine bars taxing income from the land. But § 465 bars a use tax that the State seeks to impose on personalty that the Tribe purchased out of State and which, having been installed as a permanent improvement at the resort, became so intimately connected with the land itself as to be encompassed by the statutory exemption. Pp. 3-13.

N. M. 158, 489 P. 2d 666, affirmed in part and reversed in part.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed an opinion dissenting in part, in which BRENNAN and STEWART, JJ., joined.

Conclusion

The confrontation in this case is between policy of the American Indians and the power of the State of New Mexico. The federal government has established programs to help Indian tribes reach economic and social [illegible] with Indian [illegible] action of the State of New Mexico is not only [illegible] on the federal government [illegible] policy. The [illegible] that [illegible] and [illegible] the State of New Mexico [illegible] Mexico [illegible]

Respectfully submitted,

F. RANDOLPH BURROUGHS and

GEORGE E. [illegible]

ALBUQUERQUE, NEW MEXICO

September, 1972

SUPREME COURT OF THE UNITED STATES

No. 71-738

The Mescalero Apache Tribe, Petitioner, v. Franklin Jones, Commissioner of the Bureau of Revenue of the State of New Mexico, et al.	On Writ of Certiorari to the Court of Appeals of New Mexico.

[March 27, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

The Mescalero Apache Tribe operates a ski resort in the State of New Mexico, on land located outside the boundaries of the Tribe's reservation. The State has asserted the right to impose a tax on the gross receipts of the ski resort and a use tax on certain personalty purchased out of state and used in connection with the resort. Whether paramount federal law permits these taxes to be levied is the issue presented by this case.

The home of the Mescalero Apache Tribe is on reservation lands in Lincoln and Otero Counties in New Mexico. The Sierra Blanca Ski Enterprises, owned and operated by the Tribe, is adjacent to the reservation and was developed under the auspices of the Indian Reorganization Act of 1934, 48 Stat. 984, as amended, 25 U. S. C. § 461 *et seq.*[1] After a feasibility study by the Bureau of Indian Affairs, equipment and construction money was provided by a loan from the Federal Government under

[1] In 1936, the Tribe adopted a constitution, pursuant to § 16 of the Act, 25 U. S. C. § 476.

§ 10 of the Act, 25 U. S. C. § 470, and the necessary land was leased from the United States Forest Service for a term of 30 years. The ski area borders on the Tribe's reservation, but with the exception of some cross-country ski trails, no part of the enterprise, its buildings or equipment is located within the existing boundaries of the reservation.

The Tribe has paid under protest $26,086.47 in taxes to the State, pursuant to the sales tax law, § 72-16-1 *et seq.*, N. M. S. A. (1953), based on the gross receipts of the ski resort from the sale of services and tangible property.[2] In addition, in 1968 the State assessed compensating use taxes against the Tribe in the amount of $5,887.19 (plus penalties and interest), based on the purchase price of materials used to construct two ski lifts at the resort. § 72-17-1 *et seq.*, N. M. S. A. (1953). The Tribe duly protested the use tax assessment and sought a refund of the sales taxes paid. The State Commissioner of Revenue denied both the claim for refund and the protest of assessment and the Court of Appeals of the State affirmed. The court held, essentially, that the State has authority to apply its nondiscriminatory taxes to the Tribe's enterprise and property involved in the dispute, and that the Indian Reorganization Act did not render the Tribe's enterprise a federal instrumentality, constitutionally immune from state taxation, nor did it, by its own terms, grant immunity from the taxes here involved. 83 N. M. 158, 489 P. 2d 666. The Supreme Court of New Mexico denied certiorari. 83 N. M., at 161. We granted the Tribe's petition for a writ of certiorari, 403 U. S. 905, to consider its claim that the income and property of the ski resort are not properly

[2] The Tribe asserts that "no sales tax (gross receipts tax) is being . . . charged for any ski rentals, lift tickets, food or beverages."

subject to state taxation. We affirm in part and in part reverse.

I

At the outset, we reject—as did the state court—the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise "[w]hether the enterprise is located on or off tribal land."[8] Generalizations on this subject have become particularly treacherous. The conceptual clarity of Chief Justice Marshall's word in *Worcester* v. *Georgia*, 31 U. S. (6 Pet.) 515, 556–561 (1832), has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government. See *McClanahan* v. *State Tax Commission of Arizona*, *ante*, ——; *Organized Village of Kake* v. *Egan*, 369 U. S. 60, 71–73 (1960). The upshot has been the repeated statements of this Court to the effect that even on reservations state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. *Organized Village of Kake*, supra, at 75; *Williams* v. *Lee*, 358 U. S. 217 (1959); *New York ex rel. Ray* v. *Martin*, 326 U. S. 496, 499 (1945); *Draper* v. *United States*, 164 U. S. 240 (1896). Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and

[8] Brief for Petitioner 16.

McClanahan v. State Tax Commission of Arizona, ante, ——, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.

But tribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities . . . not on any reservation." *Organized Village of Kake*, supra, at 75. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. See, e. g., *Puyallup Tribe v. Department of Game*, 391 U. S. 392, 398 (1968); *Organized Village of Kake*, supra, at 75-76; *Tulee v. Washington*, 315 U. S. 681, 683; *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U. S. 575 (1928); *Ward v. Race Horse*, 163 U. S. 504 (1896). That principle is as revelant to a State's tax laws as it is to state criminal laws, see *Ward v. Race Horse*, supra, at 516, and applies as much to tribal ski resorts as it does to fishing enterprises. See *Organized Village of Kake*, supra.

The Enabling Act for New Mexico, 36 Stat. 557 (1910),* reflects the distinction between on- and off-reservation activities. Section 2 of the Act provides that the people of the State disclaim "all right and title" to lands "owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through the United States . . . and that . . . the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." But the Act expressly provides, with respect to taxation, that "nothing herein . . . shall preclude the said State from taxing as other lands and other property are taxed,

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*A corresponding provision appears in the Constitution of the State of New Mexico, Art. XXI, § 2.

any lands or other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted . . . or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but . . . all such lands shall be exempt from taxation by said State [only] so long and to such extent as Congress has prescribed or may hereafter prescribe." It is thus clear that in terms of general power New Mexico retained the right to tax, unless Congress forbade it, all Indian land and Indian activities located or occurring "outside of an Indian reservation."[8]

We also reject the broad claim that the Indian Reorganization Act of 1934 rendered the Tribe's off-reservation ski resort a federal instrumentality constitutionally immune from state taxes of all sorts. *McCulloch* v. *Maryland*, 17 U. S. (4 Wheat.) 316 (1819). The intergovernmental immunity doctrine was once much in vogue in a variety of contexts and, with respect to Indian affairs, was consistently held to bar a state tax on the lessees of or the product or income from restricted lands of tribes or individual Indians. The theory was that a federal instrumentality was involved and that the tax would interfere with the Government's realizing the maximum return for its wards. This approach did not survive; its rise and decline in Indian affairs is described and recounted in *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376 (1938); *Oklahoma Tax Comm'n* v. *United States*, 319 U. S. 598 (1943); and *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U. S. 342 (1949), where the Court cut to the bone the proposition that restricted Indian lands

[8] The Tribe's treaty with the United States, 10 Stat. 979 (1852), which acknowledges that the Tribe is "exclusively under the laws, jurisdiction, and government of the United States . . . ," does not have the obvious effect of the State's admission legislation. See, *e. g.*, *Organized Village of Kake*, *supra*, 395 U. S., at 67–68, and cases cited therein.

and the proceeds from them were—as a matter of constitutional law—automatically exempt from state taxation. Rather, the Court held that Congress has the power "to immunize these lessees from the taxes we think the Constitution permits Oklahoma to impose in the absence of such action" and that "[t]he question whether immunity shall be extended in situations like these is essentially legislative in character." *Oklahoma Tax Comm'n v. Texas Co.*, supra, at 363-365.

The Indian Reorganization Act of 1934 neither requires nor counsels us to recognize this tribal business venture as a federal instrumentality. Congress itself felt it necessary to address the immunity question and to provide tax immunity to the extent it deemed desirable. There is, therefore, no statutory invitation to consider projects undertaken pursuant to the Act as federal instrumentalities generally and automatically immune from state taxation. Unquestionably, the Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment. It gave the Secretary of the Interior powers to create new reservations, and tribes were encouraged to revitalize their self-government through the adoption of constitutions and bylaws and through the creation of chartered corporations, with powers to conduct the business and economic affairs of the tribe.[4] As was true in the case before us, a tribe taking advantage of the Act might generate substantial revenues for the education and the social and economic welfare of its people.[5] So viewed, an enterprise such as the ski resort in this case, serves a

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[4] See generally U. S. Department of the Interior, Federal Indian Law, 129-132 (Cohen, 1958 rev.) (hereinafter Federal Indian Law); Comment, Tribal Self-Government and The Indian Reorganization Act of 1934, 70 Mich. L. Rev. 955 (1972).

[5] For other examples see Comment, n. 6 supra, at 963-965. See also J. Collier, On the Gleaming Way 140, 129-140 (1962 ed.).

general function with respect to the Government's role in Indian affairs. But the "mere fact that property is used, among others, by the United States as an instrument for effecting its purpose does not relieve it from state taxation." *Choctaw, Oklahoma & Gulf R. Co.* v. *Mackey*, 256 U. S. 531, 536 (1921). See also *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, 154 (1897).

The intent and purpose of the Reorganization Act was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." H. R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). See also S. Rep. No. 1080, 73d Cong., 1st Sess., 1 (1934). As Senator Wheeler, on the floor, put it:

> "This bill seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs and of their own property; to put it in the hands either of an Indian council or in the hands of the corporation to be organized by the Indians." 78 Cong. Rec. 11125 (1934).

Representative Howard explained that

> "The program of self-support and of business and civic responsibilities in the management of their own affairs, combined with the program of education, will permit increasing numbers of Indians to enter the white world on a footing of equal competition." *Id.*, at 11732.[8]

The Reorganization Act did not strip Indian tribes and their reservation lands of their historic immunity from

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[8] See also *id.*, at 11727, 11731–11732 (remarks of Rep. Howard); the statements of Mr. John Collier, the Commissioner of Indian Affairs, in Hearings on H. R. 7902, before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 37, 60, 65–67 (1934) (hereinafter, "House Hearings").

state and local control.* But in the context of the Reorganization Act, we think it unrealistic to conclude that Congress conceived of off-reservation tribal enterprises "virtually as an arm of the government." *Department of Employment v. United States*, 385 U. S. 355, 360 (1966). Cf. *Clallam Co. v. United States*, 263 U. S. 341 (1923). On the contrary, the aim was to disentangle the tribes from the official bureaucracy. The Court's decision in *Organized Village of Kake, supra*, which involved tribes organized under the Reorganization Act, demonstrates that off-reservation activities are within the reach of state law. See also *Puyallup Tribe, supra*,

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* The predecessor bills to the Wheeler-Howard Act, H. R. 7902 and S. 2755 (introduced respectively at 78 Cong. Rec. 2437 and 2440), expressly provided that the chartered Indian communities may act "as a Federal agency in the administration of Indian Affairs," and, correspondingly, that the United States would not "be liable for any act done . . . by a chartered Indian community." Title I, § 4 (i). 1934 House Hearings, p. 3. The bills further provided that "Nothing in this Act shall be construed as rendering the property of any Indian community . . . subject to taxation by any State or subdivision thereof . . . ." Title I, § 11. *Id.*, p. 5. The memorandum of John Collier, which accompanied the bills, stated that "[a]s a Federal agency, the property of a chartered community is constitutionally exempt from State taxation . . . ." *Id.*, p. 23. These extensive provisions for tax immunity were discarded in the Wheeler-Howard Bill, along with the accompanying provisions for more extensive governmental powers on the part of the chartered communities. See H. R. Rep. No. 1804, *supra*, p. 6. We do not read this legislative history, however, as suggesting that Congress intended to remove the traditional tax immunity that Indian Tribes enjoyed on their reservations. This reading finds support in Felix S. Cohen's treatise, see Federal Indian Law, pp. 852–853, although we believe that the broader thrust of his statement—that any "attempt by a State to impose income or other types of taxes" upon "tribal corporations organized under the Indian Reorganization Act . . . would still be held a direct burden on a Federal instrumentality"—is not supported by the modern cases and should be read with and in the light of other dimensions of the immunity doctrine in particularized contexts. See *id.*, pp. 872–873, 864–873.

201 U. S., at 398. What was said in *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575 (1928), is relevant here. At issue there was the taxability of off-reservation Indian land purchased with consent of the Secretary of the Interior with the accumulated royalties from the individual Indian's restricted allotted lands. Alienation of the purchased land was federally restricted. In rejecting a claim that state taxation of the land was barred by the federal instrumentality doctrine,[10] then Mr. Justice Stone wrote for a unanimous Court:

> "What governmental instrumentalities will be held free from state taxation, though Congress has not expressly so provided, cannot be determined apart from the purpose and character of the legislation creating them . . . .
>
> "The early legislation affecting the Indians had as its immediate object the closest control by the government of their lives and property. The first and principal need then was that they should be shielded alike from their own improvidence and the spoliation of others but the ultimate purpose was to give them the more independent and responsible status of citizens and property owners. . . .
>
> "In a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instru-

[10] The claim of tax immunity was made by a non-Indian lessee, under the rule of *Gillespie* v. *Oklahoma*, 257 U. S. 501 (1922), which was itself overruled in *Oklahoma Tax Comm'n* v. *Texas Co.*, *supra*, over two decades after *Shaw*. As a decision with respect to constitutionally mandated intergovernmental immunity, *Shaw* remains good law, although its result was altered by statute, as Congress was free to do. See generally *Board of County Comm'rs* v. *Seber*, 318 U. S. 705 (1943).

mentalities in that process. But . . . [t]o hold them immune would be inconsistent with one of the very purposes of their creation, to educate the Indians in responsibility . . . ." 276 U. S., at 579–581. We accordingly decline the invitation to resurrect the expansive version of the intergovernmental immunity doctrine that has been so consistently rejected in modern times.

II

The Tribe's broad claims of tax immunity must therefore be rejected. But there remains to be considered the scope of the immunity specifically afforded by § 5 of the Indian Reorganization Act. 25 U. S. C. § 465.

A

Section 465 provides, in part, that "any lands or rights acquired" pursuant to any provision of the Act "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."[11] On its face, the statute exempts land and rights in land, not income derived from its use. It is true that a statutory tax exemption for "lands" may, in light of its context and purposes, be con-

[11] The ski resort land was not technically "acquired" "in trust for the Indian tribe." But as the Solicitor General has pointed out, "it would have been meaningless for the United States, which already had title to the forest, to convey title to itself for the use of the Tribe." Brief for the United States as *amicus curiae* 13. We think the lease arrangement here in question was sufficient to bring the Tribe's interest in the land within the immunity afforded by § 465. It should perhaps be noted that the Tribe has not suggested that it is immune from taxation by virtue of its status as a lessee of land owned by the Federal Government. See, *e. g.*, *United States* v. *City of Detroit*, 355 U. S. 466 (1958); *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937); cf. *Helvering* v. *Mountain Producers Corp.*, *supra*; *Oklahoma Tax Commission* v. *Texas Co.*, *supra*.

strued to support an exemption for taxation on income derived from the land. See *Squire* v. *Capoeman*, 351 U. S. 1 (1956); cf. *Superior Bath House Co.* v. *McCarroll*, 312 U. S. 176 (1941).[13] But absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax.

"This Court has repeatedly said that tax exemptions are not granted by implication . . . . It has applied that rule to taxing acts affecting Indians as to all others . . . . If Congress intends to prevent the State of Oklahoma from levying a nondiscriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences." *Oklahoma Tax Comm'n* v. *United States*, *supra*, 319 U. S., at 606–607 (1943). See *Squire* v. *Capoeman*, *supra*, 351 U. S., at 6 Absent a "definitely expressed" exemption, an Indian's royalty income from Indian oil lands is subject to the federal income tax although the source of the income may be exempt from tax. *Choteau* v. *Burnet*, 283 U. S. 691, 696–697 (1931).

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[13] *Squire* v. *Capoeman* involved the attempted imposition of federal capital gains taxes on the sale price of timber logged off allotted Indian timberland (located within a reservation). The timber constituted "the major value"—if not the only practical value—of the Indian's allotted land and it was clear that if the capital gains tax was to apply, the purposes and intent of the General Allotment Act of 1887 would in large measure have been frustrated. *Id.*, at 10. The Court, relying in part on "relatively contemporaneous official and unofficial writings" on the intended scope of the income tax laws, id., at 8–9, declined to so interpret those latter-enacted laws and to find that the government intended to tax its own ward in this particular manner. In contrast to *Squire*, we find nothing fundamentally inconsistent with the intent of the Indian Reorganization Act in permitting the gross receipts of the Tribe's off-reservation enterprise to be subject to nondiscriminatory state taxes.

The Court has also held that a State, as well as the Federal Government, may tax an Indian's pro rata share of income from a tribe's restricted mineral resources. *Leahy v. State Treasurer*, 297 U. S. 420 (1936). Lessees of otherwise exempt Indian lands are also subject to state taxation. *Oklahoma Tax Comm'n v. Texas Co.*, 336 U. S. 342 (1949).

On the face of § 465, therefore, there is no reason to hold that it forbids income as well as property taxes. Nor does the legislative history support any other conclusion. As we have noted, several explicit provisions encompassing a broad tax immunity for chartered Indian communities were dropped from the bills that preceded the Wheeler-Howard Bill. See n. 9 *supra*. Similarly, the predecessor to the exemption embodied in § 465 dealt only with lands acquired for new reservations or for additions to existing reservations. 1934 House Hearings, p. 11. Here, the rights and land were acquired by the tribe beyond its reservation borders for the purpose of carrying on a business enterprise as anticipated by § 476 and § 477 of the Act.[13] These provisions were designed to encourage tribal enterprises "to enter the white world on a footing of equal competition." 78 Cong. Rec. 11732 (1934). In this context, we will not imply an ex-

[13] It is unclear from the record whether the Tribe has actually incorporated itself as an Indian chartered corporation pursuant to § 477. But see Charters, Constitutions, and By-Laws of the Indian Tribes of North America, pt. III, pp. 13–15 (G. Fay, ed., 1967). The Tribe's constitution, however, adopted under 25 U. S. C. § 476, gives its Tribal Council the powers that would ordinarily be held by such a corporation, Art. XI, and by both practice and regulations, the two entities have apparently merged in important respects. See 25 CFR § 912; Comment, n. 6 *supra*, at 973. In any event, the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business.

passive immunity from ordinary income taxes that businesses throughout the State are subject to. We therefore hold that the exemption in § 465 does not encompass nor bar the collection of New Mexico's nondiscriminatory Gross Receipts Tax and that the Tribe's ski resort is subject to that tax.

B

We reach a different conclusion with respect to the compensating use tax imposed on the personalty installed in the construction of the ski lifts. According to the Stipulation of Facts, that personal property has been "permanently attached to the realty." In view of § 465, these permanent improvements on the Tribe's tax-exempt land would certainly be immune from the State's ad valorem property tax. See *United States* v. *Rickert*, 188 U. S. 432, 441–443 (1903). We think the same immunity extends to the compensating use tax on the property. The jurisdictional basis for use taxes is the use of the property in the State. See *Henneford* v. *Silas Mason Co., Inc.*, 300 U. S. 577 (1937); *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327, 330 (1944). It has long been recognized that "use" is among the "bundle of privileges that make up property or ownership" of property and in this sense, at least, tax upon "use" is a tax upon the property itself. *Henneford* v. *Silas Mason Co., Inc., supra*, at 582. This is not to say that use taxes are for all purposes to be deemed simple ad valorem property taxes. See, *e. g.*, *United States* v. *City of Detroit*, 355 U. S. 466 (1958), and its companion cases; *Sullivan* v. *United States*, 395 U. S. 169 (1969). But use of permanent improvements upon land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for

the former. "Every reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements." *United States v. Rickert, supra,* at 442.

The judgment of the Court of Appeals is

Affirmed in part and reversed in part.

SUPREME COURT OF THE UNITED STATES

No. 71-738

The Mescalero Apache Tribe, Petitioner, v. Franklin Jones, Commissioner of the Bureau of Revenue of the State of New Mexico, et al.	On Writ of Certiorari to the Court of Appeals of New Mexico.

[March 27, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART concur, dissenting in part.

The power of Congress granted by Art. I, § 8 "To regulate commerce . . . with the Indian tribes" is an exceedingly broad one. In the liquor cases the Court held that it reached acts even off Indian reservations in areas normally subject to the police power of the States. *Perrin* v. *United States*, 232 U. S. 478. The power gained breadth by reason of historic experiences that induced Congress to treat Indians as wards of the Nation. See *Goltz* v. *Fisher*, 224 U. S. 640, 642-643; *United States* v. *Thomas*, 151 U. S. 577, 585; *United States* v. *McGowan*, 302 U. S. 535, 538. The laws enacted by Congress varied from decade to decade. See Federal Indian Law (1958), pp. 94-133, which is a revision of the monumental work Handbook of Federal Indian Law prepared by Felix S. Cohen and published in 1940.

The present Act, 48 Stat. 984, 25 U. S. C. § 461 *et seq.*, was enacted in 1934 with various purposes in mind, the two most relevant being first, "To permit Indian tribes to equip themselves with the devices of modern business organizations, through joining themselves into business corporations" and second, "To establish a system of

financial credit for Indians." S. Rep. No. 1080, 73d Cong., 2d Sess., p. 1.

Loans had been made by the federal agency to individual Indians, but the experience had not been satisfactory. Federal Indian Law, *supra*, p. 13. The 1934 Act precluded such loans and set up a $10 million revolving credit fund for loans to incorporated tribes. The industry established pursuant to that Act and involved here is a ski enterprise, adjacent to the reservation and located on lands leased from the U. S. Forest Service.

The Court makes much of the fact that the ski enterprise is not on the reservation. But that seems irrelevant to me by reason of § 5 of the Act, which provides in part "Any lands or rights acquired" pursuant to the 1934 Act "shall be taken in the name of the United States in trust for the Indian tribe . . . for which the land is acquired, and such land or rights shall be exempt from State and local taxation." 25 U. S. C. § 465. While the lease of Forest Service lands was not technically "acquired . . . in trust for the Indian tribe" the Court concedes that the lease arrangement was sufficient to bring the Tribe's interest in the land within the immunity afforded by § 465. And so the question respecting Hodel's taxes comes down to whether these taxes are within the scope of "such land or rights" as used in § 5.

I start from the premise made explicit in the Senate Report on the 1934 Act. It set forth the endorsement by President Roosevelt of "a new standard of dealing between the Federal Government and its Indian wards." S. Rep., *supra*, at 3. Art. 10 of the 1852 Treaty with the Apaches described the role of the guardian as respects these wards: "For and in consideration of the faithful performance of all the stipulations herein contained, by the said Apache's Indians, the government of the United States will grant to said Indians such donations, presents,

and implements, and adopt such other liberal and humane measures as said government may deem meet and proper."

The 1934 Act obviously is an effort by Congress to extend its control to Indian economic activities outside the reservation for the benefit of its Indian wards. The philosophy permeating the present Act was articulated by Chief Justice Marshall in *Worcester v. Georgia*, 6 Pet. 515, 556-557:

"From the commencement of our government, Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate."

As noted in *Warren Trading Post v. Tax Commission*, 380 U. S. 685, most tax immunities of Indians have related to activities on reservations. But as we stated in that case, the fact that the activities occurred on a reservation was not the controlling reason, "but rather because Congress in the exercise of its power granted in Art. I, § 8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to regulate on the subject." *Id.*, 691, n. 18.

The powers of Congress "over Indian affairs are as ample as State powers over non-Indians," subject of course to the limitations of the Bill of Rights. Federal Indian Law, p. 24. One illustration of its extent is shown by the liquor cases already cited. We deal here, however, with "tribal property"—a leasehold interest in federal lands adjoining the reservation. "The term tribal property . . . does not designate a single and definite legal institution, but rather a broad range within which important variations exist." Federal Indian Law, pp. 590-591. There is no magic in the word "reservation." *United States v. McGowan*, 302 U. S. 535, held that land

purchased by Congress for a tribe but outside a "reservation" was nonetheless "Indian country." While that case involved application of liquor laws, the Court stated that "Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out," *id.*, at 538, and that it was immaterial what the tract of land was called. *Id.*, at 539.

In the present case Congress has attempted to give this tribe an economic base which offers job opportunities, a higher standard of living, community stability, preservation of Indian culture, and the orientation of the tribe to commercial maturity. We deal only with a tribal developed enterprise. State taxation of that enterprise interferes with the federal project. The ski resort, being a federal tool to aid the tribe, may not be taxed by the State without the consent of Congress. Congress by § 5 of the Act has made the "lands or rights" acquired for the tribe exempt from state and local taxation. Section 5 indeed states that "lands or rights" acquired under the 1934 Act shall be held "in trust for the Indian tribe or individual Indian for which the land is acquired." There is no more persuasive way to tax "rights" in land than to impose an income tax on the gross or net income from those rights. If § 5 be thought to be ambiguous, we should resolve the ambiguity in favor of the tribe. As stated in *Carpenter v. Shaw*, 280 U. S. 363, 367, "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." In *Squire v. Capoeman*, 351 U. S. 1, we resolved doubts respecting the federal income tax in favor of the Indian. There is the same reason for taking that course here.

The tribal ski enterprise, unlike the private entrepreneur in *Halverson v. Producers Corp.*, 303 U. S. 376,

on which the Court relies, is plainly a federal instrumentality—authorized and financed by Congress with the aim of starting the tribe on commercial ventures. This case has no relation to *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598, which raised the question whether state inheritance taxes could be levied on restricted property. The Court only held that restricted property, as created by Congress, carried no implication of estate tax exemption. *Oklahoma Tax Commission* v. *Texas Co.*, 336 U. S. 342, also relied on by the Court, merely held that a lessee of mineral rights in Indian lands was not immunized from paying state gross production taxes and state excise taxes on petroleum produced from the lands. Those cases would be relevant here if the tribe had leased the ski resort to an outsider who sought the tribal tax immunity. We deal only with an income tax levied on a tribal corporate enterprise conducted by the tribe with federal funds on federal lands leased to the tribe. Federal Indian Law distinguished the *Helvering* and like cases relied on by the Court from an enterprise "organized solely to carry out governmental obligations, such as the tribal corporations organized" under the 1934 Act with which we now deal, pp. 852–853.

In my view this state income tax is barred by § 5 through which Congress has given tax immunity to these new tribal enterprises.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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